(25,222)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 436.

HANNAH L. ANDREWS, EXECUTRIX OF THE WILL OF BENAJAH D. ANDREWS, DECEASED, PLAINTIFF IN ERROR,

vs.

JOHN NIX & COMPANY.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 2, 1917.

a N. J. Court of Errors & Appeals.

JOHN NIX & COMPANY, Plaintiff and Respondent,

vs.

HANNAH L. ANDREWS, Executrix of the Will of Benajah D. Andrews, Deceased, Defendant and Appellant.

On Contract. Appeal from Supreme Court.

State of Case.

French & Richards, For Appellant.
Bleakly & Stockwell, For Respondent.

1 New Jersey Supreme Court.

On Contract.

JOHN NIX & COMPANY, Plaintiff,

vs.

HANNAH L. ANDREWS, Executrix, &c., of Benajah D. Andrews, Deceased, Defendant.

Stipulation.

1. The parties to this cause, plaintiff and defendant, by their several attorneys, hereby agree that the following facts are admitted, and shall constitute a special case agreed between the parties without trial, regardless of the issues raised by the pleadings on file in the above cause, and shall be argued and submitted to the determination of the New Jersey Supreme Court upon said facts.

2. And it is further agreed that if, upon the facts so admitted and agreed to, the Court shall be of the opinion that the defendant, as executrix of Benajah D. Andrews, deceased, is entitled to hold, exempt and free from the claim of the plaintiff in the declaration set forth, the proceeds, less the surrender value thereof, of testator's life insurance policies hereinafter mentioned, payable to his executors, administrators and assigns, in the New England Mutual Life Insurance Company of Boston, and in the Reserve Loan Life Insurance
2 Company of Indianapolis, Indiana, then judgment final as to the whole case shall be entered for the defendant, with costs of suit; but if, upon the facts so admitted and agreed to, the Court shall be of the opinion that the defendant, as executrix of Benajah D. Andrews, deceased, is not entitled to hold the proceeds of said policies, less the surrender value thereof, exempt and free from said claim of

the plaintiff, then judgment final as to the whole case, and for the sum of ten thousand two hundred and fifty dollars ($10,250.00), with interest as claimed in his declaration, and costs of suit, shall be entered for the plaintiff; the right to turn said case into a special verdict or to take any other steps that may be advisable for purposes of review and the right to review the judgment thereon by appeal, writ of error, or other appropriate proceeding being reserved to each party, plaintiff and defendant. It is further stipulated and agreed by the attorneys for the respective parties that all rights, if any, to equitable relief in the Court of Chancery of New Jersey, in the matter of the collection of the plaintiff's claim herein mentioned, are reserved to the plaintiff to the extent that such rights, if any, are not lost by the prosecution of this suit in the Supreme Court, it being expressly stipulated that the defendant does not concede or recognize any such rights, and does not waive any defense either by way of statute of limitations, laches or otherwise, which she may have to the assertion by the plaintiff of any such equitable claim.

Facts Admitted.

3. On February 3, 1910, an involuntary petition in bankruptcy was filed in the District Court of the United States for the District of New Jersey by Read Phosphate Company, John Nix & Company and MacMurphy Company, creditors, against Benajah D. Andrews, the petitioning creditors being represented in the proceeding by Bleakly & Stockwell, their attorneys.

3 4. On February 15, 1910, said Benajah D. Andrews died, leaving a will, wherein and whereby his widow, Hannah L. Andrews, was appointed sole executrix and she duly qualified as such executrix.

5. On April 4, 1910, said Benajah D. Andrews was by said District Court adjudicated a bankrupt.

6. On April 28, 1910, said John Nix & Company, the plaintiff, presented to and caused to be filed before S. Conrad Ott, Esq., the Referee in Bankruptcy, to whom the said bankruptcy cause had been referred, a proof of claim under oath, in writing, duly signed and in due form for the same cause of action in the declaration in this suit mentioned and declared upon, which claim was forthwith duly allowed, and also at the same time and place plaintiff filed with said Referee plaintiff's letter of attorney duly acknowledged or proven in accordance with the official form and addressed to E. G. C. Bleakly, or H. F. Stockwell, the said addressees being partners practicing law as Bleakly & Stockwell.

7. All defenses, if any, to the plaintiff's said claim, in his declaration set forth, are expressly waived and abandoned by the defendant, except the contention by way of defense that the defendant, as executrix of the said Benajah D. Andrews, is entitled to hold the proceeds of said policies mentioned in the second paragraph hereof, less their surrender value, exempt and free from the said claim of the plaintiff in his declaration set forth; it being admitted that said proceeds con-

stitute the only assets in the possession of the defendant as executrix of the will of said Benajah D. Andrews, deceased.

8. On April 28, 1910, at the first meeting of the creditors of said bankrupt, duly called by said Referee, H. F. Stockwell, Esq., one of the attorneys for the plaintiff mentioned in said letter of attorney, appeared for several creditors of the bankrupt, among them
4 being the plaintiff, and at said meeting examined two witnesses. No nomination or voting for Trustee took place; H. F. Stockwell, Esq., first suggested to the attorneys present the name of Harvey K. Partridge for Trustee and then the attorneys present, including the said attorney for plaintiff, suggested to the Referee the name of Harvey K. Partridge, and no other suggestion or recommendation being made, the Referee ap-ointed Harvey K. Partridge Trustee, and fixed his bond at $5,000. The Referee also appointed appraisers of the bankrupt's property; they duly made and filed their appraisement, showing the assets of the bankrupt to be appraised by them at figures amounting to $1,016.00. The claims against the bankrupt duly proven and allowed at the first meeting of the creditors amounted to $55,823.92. The examination and creditors' meeting was continued to May 5, 1910. Additional claims against said bankrupt's estate, duly proved and allowed therein before June 6, 1911, amounted to $33,266.94.

9. On May 3, 1910, the Trustee's bond was approved, and John D. McMullin and Bleakly & Stockwell were appointed counsel for the Trustee.

10. On May 5, 1910, at the continuance of the creditors' meeting, said H. F. Stockwell, Esq., appeared for the Trustee, and, according to the record, also for creditors, and examined two witnesses and offered some papers in evidence.

11. No application for a discharge in bankruptcy was made in said bankruptcy proceedings by the said Benajah D. Andrews, bankrupt, or by the defendant as executrix of his estate, or by any person in behalf of said bankrupt or his estate; and no discharge in bankruptcy was granted in said bankruptcy proceedings.

12. There were outstanding at the time of the bankrupt's death the following policies of insurance upon his life:
5 13. A policy issued by the Reserve Loan Life Insurance Company of Indianapolis, for $5,000.00, payable to the estate of Benajah D. Andrews. On this policy there was an unpaid premium of $290.00, reducing the proceeds of this policy to $4,710.00. This sum, less the surrender value of said policy, and less the expense of litigation, is now held by the defendant as executrix of Benajah D. Andrews, in consequence of the decision of the case of Andrews vs. Partridge, hereinafter mentioned. The surrender value of this policy, being $100.00, was paid to the Trustee in bankruptcy.

14. A policy issued by the New England Mutual Life Insurance Company for $10,000.00, payable to the executors, administrators or assigns of Benajah D. Andrews. This policy, at the time of Andrews' death, was held by the Moorestown National Bank as assignee, to secure the payment of a loan made to the bankrupt. The proceeds of this policy, less the amount of said loan and less the surrender

value of the policy, were paid to the defendant as executrix of Benajah D. Andrews, in accordance with said decision of the Supreme Court of the United States in Andrews vs. Partridge, and were received, and, less the expenses of litigation, are now held by her as said executrix. The surrender value of this policy, being $14.93, was paid to the Trustee in bankruptcy.

15. A policy issued by the Philadelphia Mutual Life Insurance Company for $10,000.00, payable to Hannah L. Andrews, wife of Benajah D. Andrews, with the right reserved to Andrews to change the beneficiary. Hannah L. Andrews, as the beneficiary named in said policy, has collected thereon the sum of $9,249.63, and now holds the same claiming it to be her own and claiming also in consequence of the judgment of the United States Circuit Court of Appeals mentioned in paragraph 21 hereof.

6 16. Ten policies for $1,000.00 each, issued by the Fidelity Mutual Life Insurance Company of Philadelphia, payable to Hannah L. Andrews, wife of Benajah D. Andrews, with the right reserved to Andrews to change the beneficiary. Hannah L. Andrews, as the beneficiary named in said policies, has collected thereon the sum of $6,375.00, and now holds the same claiming it to be her own, and claiming also in consequence of the judgment of the United States Circuit Court of Appeals mentioned in paragraph 21 hereof.

17. In order to collect the money believed by the Trustee to be due the estate in bankruptcy on these policies, and to protect and secure other assets of the estate, said Trustee, by Bleakly & Stockwell, his attorneys, on June 28, 1910, filed with said Referee a petition asking for leave to bring certain suits, among them being a suit against said Reserve Loan Life Insurance Company on said policy; a suit against the New England Mutual Life Insurance Company on said policy; a suit against the Philadelphia Mutual Life Insurance Company on said policy, and suits against the Fidelity Mutual Life Insurance Company on said policies.

18. The Referee gave notice to creditors, including plaintiff, of a meeting of creditors to be held on July 31, 1910, for the purpose of passing on said petition.

19. On July 31, 1910, at the creditors' meeting so called as aforesaid, the attorneys for the Trustee, or one of them, advocated the granting of said petition to bring said suits, and there being no objection, an order was made by the Referee, authorizing and directing the Trustee to bring such suits.

20. Of the suits so authorized, the first was commenced by the Trustee filing, on November 19, 1910, in the United States District Court for the district of New Jersey, a petition against Han-

7 nah L. Andrews, executrix, the defendant in the present suit, praying that the proceeds of said policy in the Reserve Loan Life Insurance Company and the said policy in the said New England Mutual Life Insurance Company be decreed to be a part of the bankrupt estate, free from the claim of the defendant. The proceeds of said policies, in the amounts above mentioned, were, under a stipulation of the attorneys for the Trustee and the executrix, paid by said companies to and held by the Trustee in a special account to be

checked out by the Trustee only upon the counter-signature of the Referee in Bankruptcy and of the attorneys for the executrix after the adjudication of the claims of the Trustee and the executrix. The United States District Court, after oral and written argument by said counsel for the Trustee and by counsel for the respondent, held that the proceeds of these policies, less the surrender value thereof, which was $114.93, were the property of the executrix and should be paid to her. On an appeal from this order taken to the United States Circuit Court of Appeals for the Third Circuit, it was held, after oral and printed argument by John D. McMullin and H. F. Stockwell, of counsel with the Trustee, and by counsel for the respondent, that the entire proceeds of these policies were the property of the estate in bankruptcy, and the order made by the District Court was reversed. The Supreme Court of the United States allowed a writ of certiorari to review the judgment of the said Circuit Court of Appeals and also at the same time a similar writ to review a contrary judgment on a similar state of facts which had been given by the United States Circuit Court of Appeals for the Second Circuit, the case being that of —. The Supreme Court of the United States finally decided on April 28, 1913, in favor of the executrix and against the claim of the Trustee, the opinion being reported as Andrews vs. Partridge, in 228 U. S., 479, and the said surrender value was retained by

8 the Trustee and the balance of the proceeds paid to the executrix, the defendant in this suit, who received and now holds the same, less the expenses of litigation, as said executrix.

21. In the meantime, and before the said decision of Andrews vs. Partridge, and in accordance with said order made by the Referee, a suit was instituted by the Trustee against Hannah L. Andrews to recover the proceeds of the said policies in the Philadelphia Mutual Life Insurance Company and the Fidelity Mutual Life Insurance Company, the said proceeds of which had been paid to Hannah L. Andrews, as the beneficiary named in said policies. This case was argued by John D. McMullin, of counsel with the Trustee, and by counsel for the respondent, in the United States District Court for the District of New Jersey, where an order in favor of the respondent and dismissing the petition of the Trustee was made, from which order an appeal was taken to the United States Circuit Court of Appeals, which, after oral and written argument by the said John D. McMullin, as counsel for the Trustee, and by counsel for the said executrix, reserved decision until the Supreme Court of the United States should have disposed of the case of Andrews vs. Partridge above mentioned, and on July 25, 1913, affirmed the order appealed from. No proceeding to review said judgment has ever been taken

22. On October 18, 1911, the said Trustee filed a petition showing expenses incurred by his counsel (some of which were in connection with the above mentioned suits authorized by said order of the Referee) amounting in all to $58.15, and praying that such expenses be allowed to his counsel.

23. And thereupon an order was made by the Referee, on October 20, 1911, allowing the said sum of $58.15 to the Trustee's counsel.

9 24. On October 29, 1912, the Trustee filed his report, showing the sale of property and the conduct of the above mentioned litigation and an account showing receipts of $2,905.87, and disbursements of $1,666.56, leaving a balance of cash on hand of $1,239.11. Among the disbursements was a payment of $1,056.46 to Ida W. Wheatman, said amount being funds which, after litigation with the Trustee in bankruptcy, were finally adjudged to her as her money erroneously included among the assets of the estate and ordered to be returned to her.

25. On May 26, 1913, the Trustee filed his petition, stating that the litigation carried to the Supreme Court of the United States had been decided adversely to the Trustee, and stating the condition of other litigation, and the fact that his counsel had, in such litigation, incurred expenses amounting to $139.75, in addition to those already allowed as above mentioned, and praying that the Trustee be instructed to pay the same at once.

26. On January 10, 1914, the Trustee filed his second report and account, showing that all property belonging to the estate had been reduced to cash, and the administration thereof practically completed, showing the disbursements since the last report, a part of which was in connection with said litigation, and showing a balance of cash on hand of $921.73, and praying for the declaration of a dividend.

27. On January 27, 1914, John D. McMullin and Bleakly & Stockwell, counsel for the Trustee, filed their petition, asking for an allowance of $600.00.

28. On January 27, 1914, Bleakly & Stockwell, as attorneys for the petitioning creditors, including the plaintiff herein, filed their petition for an allowance of $50.00 for preparing and filing the petition in bankruptcy and the list of creditors.

10 29. The Referee gave notice to creditors, including plaintiff, of a meeting to be held on February 13, 1914, to pass upon and approve the report and account of the Trustee, to pass upon the petition of attorneys for petitioning creditors for compensation, to pass upon petition of attorneys for the Trustee for compensation, to declare a dividend to all creditors whose claims had been filed and allowed, and to transact such other business as might properly come before the meeting, and in said notice stated the balance in the hands of the Trustee and the amounts prayed for by the attorneys for the petitioning creditors and the attorneys for the trustee.

30. The plaintiff having been advised by his attorneys shortly after the first meeting of creditors above mentioned that unless the proceeds of the bankrupt's policies of life insurance made payable to his estate or to his executors, administrators or assigns were legally a part of the assets of the estate in bankruptcy, there could be only a very small dividend for creditors of the bankrupt estate; and that if, in the event of litigation, it should be decided that said proceeds of said policies were not assets of the estate in bankruptcy, but should be turned over to the executrix of Andrews' estate, that it would be necessary for plaintiff to present its claim to said executrix in the Orphans' Court of Burlington county, and to pursue such remedy as might be

had from the decedent's personal representative in the Courts of New Jersey, application was, therefore, on February 13, 1914, made to the United States District Court for an order, of which the following is a copy:

United States District Court, District of New Jersey.

In the Matter of BENAJAH D. ANDREWS, Bankrupt.

Order Expunging Claim.

11 31. Application for this purpose having been made by Bleakly & Stockwell, attorneys for John Nix & Company, who, it appears, have made proof of claim in this matter against said bankrupt estate for $10,250.00, being the amount due from the bankrupt upon three promissory notes:

It is, therefore, ordered, on this thirteenth day of February, nineteen hundred and fourteen, that said claim and each and every other claim, if any, of said John Nix & Company, by or for it proven in this matter and against said estate, be, and the same hereby is wholly withdrawn from said bankruptcy proceedings and expunged from the list of claims upon the record in this case, and excluded from participating in the distribution of the estate of the said Benajah D. Andrews, bankrupt, under said bankruptcy proceedings.

Let this order be entered.

S. CONRAD OTT,
Referee in Bankruptcy.

On motion of

BLEAKLY & STOCKWELL,
Attorneys for John Nix & Company.

We consent to the entering of this order.

BLEAKLY & STOCKWELL,
Attorneys for John Nix & Company.

32. The creditors' meeting called for February 13, 1914, was, by order duly made and entered on said day, adjourned to March 18, 1914.

33. On May 11, 1914, the Referee made an order allowing to Bleakly & Stockwell, as counsel for the petitioning creditors, the sum of $50, and to Bleakly & Stockwell, as counsel for the Trustee,
12 the sum of $350, allowing to the Trustee his commissions and declaring and ordering a final dividend of .0136 per cent., all of which amounts and allowances were afterwards paid by the Trustee in accordance with said order; but no dividend in said bankruptcy proceedings was paid to plaintiff on his said claim, neither was any other payment thereon or any entire or partial satisfaction thereof made out of said estate in bankruptcy or otherwise, except to the extent, if any, that the facts above agreed to amount to a dividend, payment or satisfaction.

34. The order made by the Referee, as stated in the preceding paragraph, allowing the sum of $350.00 to Bleakly & Stockwell, as counsel for the Trustee, was erroneous in failing to state that said allowance was also for John D. McMullin, as counsel for the Trustee, as well as for Bleakly & Stockwell, as such counsel; which error was rendered harmless by the payment of half of said allowance by Bleakly & Stockwell to the said John D. McMullin, for his services as counsel for the Trustee.

35. It is further agreed that either plaintiff or defendant shall be at liberty to print as a part of the state of the case or of his brief, a full and correct copy of any record, document or paper writing hereinbefore referred to, or a full and correct copy of any document or paper in the files of the United States District Court in said bankruptcy proceedings, said copies of said records, documents, or papers, if full and correct, being agreed upon by the parties hereto as a part of this stipulation.

BLEAKLY & STOCKWELL,
Attorneys for Plaintiff.
FRENCH & RICHARDS,
Attorneys for Defendant.

13 *Will of Benajah D. Andrews.*

I, Benajah D. Andrews, of the city and county of Camden and State of New Jersey, being of sound and disposing mind, memory and understanding, do make and publish this, my last will and testament.

First: I order and direct that all my just debts and funeral expenses shall be paid and satisfied by my executrix hereinafter named as soon as conveniently may be after my decease.

Second: I give and devise unto my son, Albert T. Andrews, his heirs and assigns forever, my undivided one-half interest in the farm situated on the Church road, near Colestown, in Delaware township, Camden county, New Jersey, which is owned by my brother Clayton L. Andrews and myself, as tenants in common, and also all my undivided one-half interest in all the wood lands devised by the will of my grandfather, Clayton Lippincott, to my brother Clayton L. Andrews and myself.

I also give and devise unto my son, Albert T. Andrews, his heirs and assigns, all my undivided interest in any lands which I may hold in common with my brother, Clayton L. Andrews, at the time of my decease.

Third: All the rest, residue and remainder of my estate, real, personal or mixed, whatsoever and wheresoever situate, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, I give, devise and bequeath unto my wife, Hannah L. Andrews, her heirs and assigns forever.

Fourth: I hereby authorize and empower my executrix, hereinafter named to sell any or all of my real estate, either at pub-
14 lic or private sale, at such times and for such prices as to her shall be satisfactory, and to execute, acknowledge and deliver

good and sufficient deeds of conveyance therefor, in fee simple, without any liability on the part of the purchaser or purchasers thereof, as to the application, misapplication or non-application of the purchase money.

Lastly: I do hereby make, ordain, nominate, constitute and appoint my wife Hannah L. Andrews, sole executrix of this my last will and testament.

In witness whereof, I, the said Benajah D. Andrews, have to this my last will and testament, set my hand and seal on this twenty-first day of February, in the year of our Lord, one thousand nine hundred and three.

BENAJAH D. ANDREWS. [SEAL.]

Signed, sealed, published and declared by the above-named Benajah D. Andrews as and for his last will and testament in the presence of us, who were present at the same time, and who at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto.

ALBERT D. AMBRUSTER.
WM. D. LIPPINCOTT.

15 New Jersey Supreme Court, February Term, 1915.

JOHN NIX & COMPANY

vs.

HANNAH L. ANDREWS, Executrix.

Submitted February 28, 1915. Decided June 17, 1915.

Upon an Agreed Case.

Before Gummere, C. J., and Justices Garrison and Minturn.

For the plaintiff, Bleakly & Stockwell.
For the defendant, French & Richards.

Per CURIAM:

This is a case agreed upon between the parties and submitted to the Court under rule 150. In the State of the case it is stipulated that if upon the facts agreed to the Court shall be of opinion that the defendant, as executrix of Benajah D. Andrews, deceased, is not entitled to hold the proceeds of certain named policies, less the surrender value thereof exempt and free from the claim of the plaintiff, then judgment final for the sum of $10,250, with interest as claimed in the declaration and costs of suit, shall be entered for the plaintiff.

The case turns upon whether or not the plaintiff has participated in the distribution of the estate of Benajah D. Andrews, deceased, under certain bankruptcy proceedings. The institution of the bank-

ruptcy proceedings and the allowance of counsel fees for litigation under leave of the Bankruptcy Court is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

16 The question whether or not the plaintiff is in a legal sense a participant in the distribution of the estate of the bankrupt is in our opinion foreclosed by the order of the Bankruptcy Court made on February 13, 1913, by which the claim of the plaintiff is expunged from the list of claims and excluded from participating in the distribution of the estate of the bankrupt under such bankruptcy proceedings. This order while it stands is conclusive of the matters covered by it.

Young vs. Young, 45, N. J. L., p. 197.

If it was improvidently entered it must be directly attacked in the Court that was imposed upon. It cannot upon this or upon any similar ground be collaterally assailed.

In Shearman vs. Cameron (78 N. J. Eq., p. 532), is collected a large number of cases illustrating and enforcing this rule.

In accordance with the case agreed upon, judgment is ordered for the plaintiff for $10,250, with interest and costs.

Judgment entered for plaintiff against defendant on June 26, 1915, for $13,880.07 damages and $29.00 costs.

17 New Jersey Supreme Court.

On Contract.

JOHN NIX & COMPANY, Plaintiff,

vs.

HANNAH L. ANDREWS, Executrix, &c., of Benajah D. Andrews, Deceased, Defendant.

Notice of Appeal.

To Messrs. Bleakly & Stockwell, Attorneys of Plaintiff:

Take notice, that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

FRENCH & RICHARDS,
Attorneys of Appellant.

Service duly acknowledged July 6, 1915.

18 New Jersey Supreme Court.

On Contract.

JOHN NIX & COMPANY, Plaintiff and Respondent,

vs.

HANNAH L. ANDREWS, Executrix, &c., of Benajah D. Andrews, Deceased, Defendant and Appellant.

Grounds of Appeal.

The appellant states the following grounds of appeal:

1. The interpretation placed by the Court upon the Bankruptcy Act of the United States is erroneous.

2. The judgment appealed from is in a suit wherein was drawn in question the construction of a statute of the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such statute.

3. The Court erred in its finding or judgment that the institution of bankruptcy proceedings is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

4. The Court erred in its finding or judgment that the allowance of counsel fees for litigation under leave of the Bankruptcy Court is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

19 5. The Court erred in its finding or judgment that the institution of bankruptcy proceedings and the allowance of counsel fees for litigation under leave of the Bankruptcy Court is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

6. The Court erred in its finding or judgment that the payment of a portion of the funds of the bankrupt estate to counsel for the plaintiff in discharge of an indebtedness of plaintiff to his counsel for services in instituting the bankruptcy proceeding was not a participation by plaintiff in the distribution of the bankrupt's estate.

7. The Court should have found that by the stipulated facts plaintiff instituted the bankruptcy proceeding, presented its claim to the Referee in Bankruptcy for the same cause of action, which claim was duly allowed, filed with the Referee a letter of attorney in the official form, addressed to Messrs. Bleakly & Stockwell, the same attorneys who represented it in filing the petition in bankruptcy and the attorneys appearing for it in the instant suit, through its said attorneys selected the trustee who thereupon selected these same attorneys as his counsel, received notice of and made no objection to the petition of the trustee to bring suit for the assets in question, and that also before the order of February 13, 1914, was made, it appeared by reports on file that the action taken and authorized by

the plaintiff had used up substantially all the bankrupt estate, and that this in law was a participation by the plaintiff in the distribution of the estate under the bankruptcy proceedings.

8. The Court should have found that the participation by counsel for plaintiff in the distribution of the estate pays and discharges an indebtedness of plaintiff to its counsel and is in legal effect a participation by the plaintiff itself.

20 9. The Court upon the undisputed facts should have found that prior to the order of February 13, 1914, the plaintiff had participated.

10. The Court upon the undisputed facts should have found that after the order and notwithstanding the order plaintiff participated.

11. The Court erred in its finding or judgment that the question whether or not the plaintiff is in a legal sense a participant in the distribution of the estate of the bankrupt is foreclosed by the order of the Bankruptcy Court made on February 13, 1914.

12. The Court erred in its finding or judgment that by the order of the Bankruptcy Court made on February 13, 1914, the claim of the plaintiff is expunged from the list of claims and excluded from participating in the distribution of the estate of the bankrupt under such bankruptcy proceedings.

13. The Court erred in its finding or judgment that the order last above mentioned covers the matter in controversy.

14. The Court erred in its finding or judgment that the order last above mentioned is conclusive of the matter in controversy.

15. The Court should have found that the procedure of the Bankruptcy Court afforded no opportunity to litigate the order in question.

16. The Court should have found that plaintiff had already participated in the distribution of the estate and no order that plaintiff might put upon the record without notice and without a hearing could change that fact.

21 17. The Court should have found that the order does not pretend to deny or change the fact that plaintiff had already participated.

18. The Court should have found that the effect of the ex parte order so voluntarily entered is that plaintiff holds on to what it has already received or used up and assigns to the other claimants its share of whatever may remain.

19. The Court should have found that there is no attempt to collaterally attack the order whereby plaintiff voluntarily orders himself excluded from further participation, the point being that he had already participated and notwithstanding the order afterwards again participated.

20. The Court should have found that the order at most is a restraining order directing the plaintiff not to participate, that the order is not collaterally attacked when it is shown that the plaintiff had already participated and that a contempt may be shown but there is no collateral attack in showing that afterwards and in spite of the order there was a participation.

21. The Court erred in ordering judgment for the plaintiff.
22. The Court should have rendered judgment for the defendant.

FRENCH & RICHARDS,
Attorneys for Defendant.

22

Form C248.

Doc. No. —.

STATE OF NEW JERSEY:

Court of Errors and Appeals, November Term, 1915.

Appeal from Supreme Court.

Error to — Court.

John Nix & Company

and

Hannah L. Andrews, Ex'r'x.

No. 86, of Nov. Term, 1915.

Date, March, 1916.

Chancellor, Presiding.

Opinion by the Court Below.

Check list.	Affirm.	Reverse.	Modify.
The Chancellor	1		
" [Chief Justice]*			
Mr. Justice [Garrison]*			
" " Swayze	1		
" " Trenchard	1		
" " Parker	1		
" " Bergen	1		
" " [Minturn]*			
" " Kalisch	1		
" " Black	1		
Judge [White]*			
" Terhune	1		
" Heppenheimer	1		
" Williams	1		
" Taylor	1		
" [Gardner]*			
Totals	11		

Filed Mar. 6, 1916. Thomas F. Martin, Clerk.

[* Words enclosed in brackets erased in copy.]

23 New Jersey Court of Errors and Appeals, November Term, 1915.

No. 86.

JOHN NIX & COMPANY, Respondent,

v.

HANNAH L. ANDREWS, Executrix of the Will of Benajah D. Andrews, Deceased, Appellant.

On appeal from the Supreme Court, in which the following per curiam was filed:

"This is a case agreed upon between the parties and submitted to the court under rule 150. In the state of the case it is stipulated that if upon the facts agreed to, the court shall be of opinion that the defendant, as executrix of Benajah D. Andrews, deceased, is not entitled to hold the proceeds of certain named policies, less the surrender value thereof, exempt and free from the claim of the plaintiff, then judgment final for the sum of $10,250, with interest as claimed in the declaration and costs of suit, shall be entered for the plaintiff.

The case turns upon whether or not the plaintiff has participated in the distribution of the estate of Benejah D. Andrews, deceased, under certain bankruptcy proceedings. The institution of the bankruptcy proceedings and the allowance of counsel fees for litigation under leave of the bankruptcy court is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

The question whether or not the plaintiff is in a legal sense a participant in the distribution of the estate of the bankrupt is in our opinion foreclosed by the order of the bankruptcy court made on February 13, 1913, by which the claim of the plaintiff is expunged from the list of claims and excluded from participating in the distribution of the estate of the bankrupt under such bankruptcy proceedings. This order while it stands is conclusive of the matters covered by it. Young v. Young, 45 N. J. L., 197.

If it was improvidently entered it must be directly attacked in the court that was imposed upon. It cannot upon this, or upon any similar ground, be collaterally assailed.

In Shearman v. Cameron, 78 N. J. Eq., 532, is collected a large number of cases illustrating and enforcing this rule.

In accordance with the case agreed upon, judgment is ordered for the plaintiff for $10,250, with interest and costs."

For the appellant, French & Richards.
For the respondent, Bleakly & Stockwell.

Per CURIAM:

The judgment of the court below will be affirmed for the
24 reasons stated in its per curiam.

Endorsed: "Filed Mar. 6, 1916. Thomas F. Martin, Clerk."

25 New Jersey Court of Errors and Appeals, November Term, 1915.

Between

HANNAH L. ANDREWS, Executrix of the Will of Benajah D. Andrews, Dec'd, Appellant,

vs.

JOHN NIX AND COMPANY, Respondent.

On Appeal from Supreme Court.

Order on Affirmance of Judgment.

This cause having been duly argued at the November Term, 1915, of this court by French & Richards, of counsel for the appellant, and Bleakly & Stockwell, of counsel for the respondent, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court—

It is thereupon, on this Sixth day of March in the year of our Lord one thousand nine hundred sixteen ordered and adjudged that the judgment of the Supreme Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

BLEAKLY & STOCKWELL,
Attorney- for Respondent.

26 [Endorsed:] New Jersey Court of Errors and Appeals, November Term, 1915. Hannah L. Andrews, executrix of the will of Benajah D. Andrews, deceased, Appellant, vs. John Nix and Company, Respondent. On Appeal from Supreme Court. Order Affirming Judgment. Bleakly & Stockwell, Att'ys. Filed Mar. 8, 1916. Thomas F. Martin, Clerk.

27 To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey and Chief Judge of the New Jersey Court of Errors and Appeals:

The petition of Hannah L. Andrews executrix of the will of Benajah D. Andrews, deceased, respectfully shows that the Court of Errors and Appeals of the State of New Jersey rendered a final judgment against your petitioner in a certain cause therein wherein

John Nix & Company was respondent and plaintiff below and your petitioner was appellant and defendant below affirming a judgment of the New Jersey Supreme Court against your petitioner and in favor of said John Nix & Company for $13,880.07 damages and $29.00 costs as will appear by reference to the record and proceedings in said cause; and that said Court of Errors and Appeals is the highest court of said state in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error because the suit in the state court drew in question the construction of the Bankruptcy Act of the United States and the decision was against the title right privilege or exemption specially set up and claimed by your petitioner under said statute as appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ
28 of error returnable into the Supreme Court of the United States, and for citation; and your petitioner will ever pray &c.

HANNA L. ANDREWS,
Executrix, &c., of Benajah D. Andrews, Deceased, Petitioner.
THOMAS E. FRENCH,
SAMUEL H. RICHARDS,
Attorneys for Petitioner.

Let the writ of error issue as prayed.

E. R. WALKER,
Chancellor of New Jersey and President Judge of the Court of Errors and Appeals in the Last Resort in All Causes in said State.

29 [Endorsed:] New Jersey Court of Errors and Appeals. 3480. John Nix & Company, Plaintiff and Respondent, vs. Hannah L. Andrews, Executrix of the Will of Benajah D. Andrews, Deceased, Defendant and Appellant. Appeal from Supreme Court. Petition. French & Richards, Att'ys, 106 Market Street, Camden, N. J. Filed Mar. 29, 1916. Thomas F. Martin, Clerk.

30 New Jersey Court of Errors and Appeals.

JOHN NIX & COMPANY, Plaintiff and Respondent,

vs.

HANNAH L. ANDREWS, Executrix of the Will of Benajah D. Andrews, Deceased, Defendant and Appellant.

Assignment of Errors.

Now comes Hannah L. Andrews, executrix of the will of Benajah D. Andrews, deceased, and respectfully submits that in the record,

proceedings, decision and final judgment of the Court of Errors and Appeals of the State of New Jersey in the above-entitled matter, there is manifest error in this, to wit:

1. The interpretation placed by the said Court upon the Bankrupt Act of the United States is erroneous.

2. The judgment sought to be here reviewed is in a suit wherein was drawn in question the construction of a statute of the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such statute.

3. The Court erred in its finding or judgment that the institution of bankruptcy proceedings is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

31 4. The Court erred in its finding or judgment that the allowance of counsel fees for litigation under leave of the Bankruptcy Court is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

5. The Court erred in its finding or judgment that the institution of bankruptcy proceedings and the allowance of counsel fees for litigation under leave of the Bankruptcy Court is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

6. The Court erred in its finding or judgment that the payment of a portion of the funds of the bankrupt estate to counsel for the plaintiff in discharge of an indebtedness of plaintiff to his counsel for services in instituting the bankruptcy proceeding was not a participation by plaintiff in the distribution of the bankrupt's estate.

7. The Court should have found that by the stipulated facts plaintiff instituted the bankruptcy proceeding, presented its claim to the Referee in Bankruptcy for the same cause of action, which claim was duly allowed, filed with the referee, a letter of attorney in the official form addressed to Messrs. Bleakly & Stockwell, the same attorneys who represented it in filing the petition in bankruptcy and the attorneys appearing for it in the instant suit, through its said attorneys selected the trustee who thereupon selected these same attorneys as his counsel, received notice of and made no objection to the petition of the trustee to bring suit for the assets in question, and that also before the order of February 13, 1914, was made, it appeared by reports on file that

32 the action taken and authorized by the plaintiff had used up substantially all the bankrupt estate, and that this in law was a participation by the plaintiff in the distribution of the estate under the bankruptcy proceedings.

8. The Court should have found that the participation by counsel for plaintiff in the distribution of the estate pays and discharges an indebtedness of plaintiff to its counsel and is in legal effect a participation by the plaintiff itself.

9. The Court upon the undisputed facts should have found that prior to the order of February 13, 1914, the plaintiff had participated.

10. The Court upon the undisputed facts should have found that after the order and notwithstanding the order plaintiff participated.

11. The Court erred in its finding or judgment that the question whether or not the plaintiff is in a legal sense a participant in the distribution of the estate of the bankrupt is foreclosed by the order of the Bankruptcy Court made on February 13, 1914.

12. The Court erred in its finding or judgment that by the order of the Bankruptcy Court made on February 13, 1914, the claim of the plaintiff is expunged from the list of claims and excluded from participating in the distribution of the estate of the bankrupt under such bankruptcy proceedings.

13. The Court erred in its finding or judgment that the order last above mentioned covers the matter in controversy.

33 14. The Court erred in its finding or judgment that the order last above mentioned is conclusive of the matter in controversy.

15. The Court should have found that the procedure of the Bankruptcy Court afforded no opportunity to litigate the order in question.

16. The Court should have found that plaintiff had already participated in the distribution of the estate and no order that plaintiff might put upon the record without notice and without a hearing could change that fact.

17. The Court should have found that the order does not pretend to deny or change the fact that plaintiff had already participated.

18. The Court should have found that the effect of the ex parte order so voluntarily entered is that plaintiff holds on to what it has already received or used up and assigns to the other claimants its share of whatever may remain.

19. The Court should have found that there is no attempt to collaterally attack the order whereby plaintiff voluntarily orders himself excluded from further participation, the point being that he had already participated and notwithstanding the order afterwards again participated.

20. The Court should have found that the order at most is a restraining order directing the plaintiff not to participate, that the order is not collaterally attacked when it is shown that the plaintiff had already participated and that a contempt may be shown but there is no collateral attack in showing that afterwards and in spite of the order there was a participation.

34 21. The Court erred in affirming the judgment for the plaintiff.

22. The Court should have reversed the judgment.

THOMAS E. FRENCH,
SAMUEL H. RICHARDS,
Attorneys for Plaintiff in Error

35 [Endorsed:] New Jersey Court of Errors and Appeals. 3480. John Nix & Company, Plaintiff & Respondent, vs. Hannah L. Andrews, executrix of the will of Benajah D. Andrews, deceased. Assignment of Errors. French & Richards, Att'ys, 106 Market Street, Camden, N. J. Filed Mar. 29, 1916. Thomas F. Martin, Clerk.

36 UNITED STATES OF AMERICA, *ss:*

[Seal District Court of the United States, District of New Jersey.]

The President of the United States to the Honorable Judges of the Court of Errors and Appeals of the State of New Jersey, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Court of Errors and Appeals of the State of New Jersey before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between John Nix & Company, plaintiff-respondent, and Hannah L. Andrews, executrix of the will of Benajah D. Andrews deceased, defendant-appellant, wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under said clause of said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said Hannah L. Andrews executrix as aforesaid as by her complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein
37 given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States together with this writ, so that you have the same at Washington, on the eleventh day of April next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court the Fifth day of April in the year of our Lord one thousand nine hundred and sixteen.

GEORGE T. CRANMER, *Clerk,*
By CHARLES S. CHEVRIER,
Deputy Clerk.

Allowed by—

E. R. WALKER,
Chancellor of New Jersey and President Judge of the Court of Errors and Appeals in the Last Resort in All Causes in said State.

38 & 39 [Endorsed:] United States Supreme Court. 3480. Hannah L. Andrews, executrix, Plaintiff in Error, v. John Nix & Company, Defendant in Error. Writ of Error to New Jersey Court of Errors and Appeals. Returnable April 11, 1916. Thomas E. French, Samuel H. Richards, Attorneys. Filed Mar. 29, 1916. Thomas F. Martin, Clerk.

40 Know all men by these presents, that we, Hannah L. Andrews and Joseph Kaighn and Amos E. Kaighn, all of the township of Chester in the County of Burlington and State of New Jersey, are held and firmly bound unto John Nix & Company in the sum of two hundred and fifty dollars, to be paid to the said John Nix & Company, its successors and assigns to which payment well and truly to be made we bind ourselves and our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this fourteenth day of March, A. D. 1916.

Whereas, lately at a term of the Court of Errors and Appeals of the State of New Jersey, in a suit depending in said court between John Nix & Company plaintiff and respondent and Hannah L. Andrews executrix of the will of Benajah D. Andrews deceased defendant and appellant the court affirmed a judgment of New Jersey Supreme Court of $13,880.07 damages and $29.00 costs which in said Supreme Court was rendered against the said defendant and the said defendant having obtained a writ of error to remove the judgment in the aforesaid suit:

Now, therefore, the condition of this obligation is such that if the said Hannah L. Andrews executrix of the will of Benajah D. Andrews deceased shall prosecute said writ of error to effect and answer all costs if she fails to make her plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

HANNA L. ANDREWS. [SEAL.]
JOSEPH KAIGHN. [SEAL.]
AMOS E. KAIGHN. [SEAL.]

Signed, sealed and delivered in the presence of—

WM. A. FORMAN, JR.

41 STATE OF NEW JERSEY,
County of Burlington, ss:

Joseph Kaighn and Amos E. Kaighn, sureties named in the foregoing bond, each alleging himself to be conscientiously scrupulous against taking an oath, and each being duly affirmed on his solemn affirmation, affirms and says that he is a resident and freeholder in the County of Burlington and State of New Jersey, and is worth the sum of five hundred dollars over and above all his debts and liabilities exclusive of property exempt from execution.

JOSEPH KAIGHN.
AMOS E. KAIGHN.

Affirmed and subscribed to this fourteenth day of March, A. D. 1916, before me a notary public in and for the County of Burlington, State of New Jersey.

CLARENCE R. LIPPINCOTT, [SEAL.]
Notary Public for N. J.

Com. expires 3/15/1918.

I hereby approve the foregoing bond and sureties.

E. R. WALKER,
Chancellor and President Judge of the New Jersey Court of Errors and Appeals in the Last Resort in All Causes in said State.

[Endorsed:] New Jersey Court of Errors and Appeals. John Nix & Company, Plaintiff and Respondent, vs. Hannah L. Andrews, executrix of the will of Benajah D. Andrews, deceased, Defendant and Appellant. Appeal from Supreme Court. Bond. Approved inside, E. R. W., C. & P. J. Filed Mar. 29, 1916. Thomas F. Martin, Clerk.

42 STATE OF NEW JERSEY:

[Vignette.]

Court of Errors and Appeals.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that there was lodged with me as such Clerk, on March 29th, 1916, in the case of John Nix & Company, Plaintiff and Respondent, vs. Hannah L. Andrews, Executrix of the Will of Benajah D. Andrews, Deceased, Defendant and Appellant:

1. The original Bond of which a copy is herein set forth.
2. Two copies of Writ of Error, as herein set forth—one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Thirtieth day of March, A. D. 1916.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

43 STATE OF NEW JERSEY:

[Vignette.]

Court of Errors and Appeals.

JOHN NIX & COMPANY, Plaintiff and Respondent,

vs.

HANNAH L. ANDREWS, Executrix of the Will of Benajah D. Andrews, Deceased, Defendant and Appellant.

In obedience to the command of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified

transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Thirtieth day of March, A. D. 1916.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

44 UNITED STATES OF AMERICA, *ss:*

To John Nix & Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of Court of Errors and Appeals of the State of New Jersey, wherein Hannah L. Andrews, executrix, &c., of Benajah D. Andrews deceased is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States this 28th day of March, in the year of our Lord one thousand nine hundred and sixteen.

Allowed by—

E. R. WALKER,
Chancellor and President Judge of the New Jersey Court of Errors and Appeals in the Last Resort in All Causes in said State.

Service of the above citation upon John Nix & Company is acknowledged this twenty-eighth day of March, A. D. 1916.

BLEAKLY & STOCKWELL,
Attorneys for John Nix & Company.

Endorsed on cover: File No. 25,222. New Jersey Court of Errors and Appeals. Term No. 436. Hannah L. Andrews, executrix of the will of Benajah D. Andrews, deceased, plaintiff in error, vs. John Nix & Company. Filed April 7th, 1916. File No. 25,222.

Office Supreme Court, U. S.
FILED
AUG 16 1917
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 140.

HANNAH L. ANDREWS, EXECUTRIX OF THE WILL OF BENAJAH D. ANDREWS, DECEASED, PLAINTIFF IN ERROR,

vs.

JOHN NIX & COMPANY, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

THOMAS E. FRENCH,
SAMUEL H. RICHARDS,
Counsel for Plaintiff in Error.

(25,222)

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SUPREME COURT OF THE UNITED STATES.

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No. 140.

HANNAH L. ANDREWS, EXECUTRIX OF THE WILL OF BENAJAH D. ANDREWS, DECEASED, PLAINTIFF IN ERROR,

vs.

JOHN NIX & COMPANY, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is a writ of error to the New Jersey Court of Errors and Appeals to review a judgment entered upon appeal, which judgment affirmed a judgment of the New Jersey Supreme Court adjudging that John Nix & Company, a creditor of the decedent bankrupt, did not participate in the distribution of the estate under the bankruptcy proceedings, and this notwithstanding the admitted fact that the creditor in question instituted the bankruptcy proceedings, selected the trustee, and directed the trustee to take action and incur expenses which used up the bankrupt estate; and the further

admitted fact that the attorneys for the creditor actually received a part of the bankrupt estate as an allowance for their services.

The case was agreed between the parties without trial and submitted to the New Jersey Supreme Court under its Rule 150, the pertinent part of which reads as follows:

> "150. At the opening of each term the court will habitually sit in three parts: Part I, heretofore known as the main court, will sit for the hearing of" * * * "cases agreed between the parties without trial."

The right to review the judgment was expressly reserved (Transcript of Record, page 2, lines 6, 7, and 8).

John Nix & Company, the plaintiff in the court of first instance and the defendant in error here (we shall in this brief call it the plaintiff), is a creditor of Benajah D. Andrews, deceased, and brought this suit against Mrs. Andrews in her capacity as executrix (she was defendant below and is plaintiff in error here and we shall in this brief call her the defendant), the purpose of the suit being to recover the debt due to the plaintiff from the decedent.

Prior to the death of Benajah D. Andrews bankruptcy proceedings were commenced against him and he was afterwards declared a bankrupt. Under the bankruptcy act (section 70), the title to all his property and assets thereupon passed to his trustee in bankruptcy. The only asset which could come to the defendant as executrix was the proceeds of insurance policies exempted under section 70*a* (5) of the act (Stipulation, pages 2 and 3, paragraph 7).

The defense in this suit is that the only assets which have come or can come to the defendant are the proceeds of insurance policies awarded to her by the bankruptcy court, and that she is entitled to hold, own, and carry these assets free from the claim of the plaintiff, who participated in the bankruptcy proceedings.

Just what the plaintiff has done is stipulated. If this is a participation, then the bankruptcy act, section 70*a* (5), entitles the defendant to hold the assets free from the claim of the plaintiff, and the stipulation requires a judgment for the defendant.

The Supreme Court expressed the opinion that certain things which it mentioned (it did not mention all) were not a participation. It placed its decision, however, upon the ground that the question whether or not the plaintiff was a participant was foreclosed by an order made by the bankruptcy court and consequently ordered judgment for the plaintiff.

From the judgment against her the defendant appealed to the New Jersey Court of Errors and Appeals. That court in a memorandum *per curiam* opinion affirmed the judgment.

Nix & Co. *vs.* Andrews, 88 N. J. L., 721.

The interpretation thus placed upon the bankruptcy act denies to the defendant valuable rights and immunities guaranteed to her by that statute, and she therefore brings the matter here by writ of error.

Specification of Errors.

1. The interpretation placed by the said court upon the bankrupt act of the United States is erroneous.

2. The judgment sought to be here reviewed is in a suit wherein was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such statute.

3. The court erred in its finding or judgment that the institution of bankruptcy proceedings is not a participation

in the distribution of the bankrupt's estate within the legal meaning of that term.

4. The court erred in its finding or judgment that the allowance of counsel fees for litigation under leave of the bankruptcy court is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

5. The court erred in its finding or judgment that the institution of bankruptcy proceedings and the allowance of counsel fees for litigation under leave of the bankruptcy court is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

6. The court erred in its finding or judgment that the payment of a portion of the funds of the bankrupt estate to counsel for the plaintiff in discharge of an indebtedness of plaintiff to his counsel for services in instituting the bankruptcy proceeding was not a participation by plaintiff in the distribution of the bankrupt's estate.

7. The court should have found that by the stipulated facts plaintiff instituted the bankruptcy proceeding, presented its claim to the referee in bankruptcy for the same cause of action, which claim was duly allowed; filed with the referee a letter of attorney in the official form, addressed to Messrs. Bleakly & Stockwell, the same attorneys who represented it in filing the petition in bankruptcy and the attorneys appearing for it in the instant suit; through its said attorneys selected the trustee, who thereupon selected these same attorneys as his counsel; received notice of and made no objection to the petition of the trustee to bring suit for the assets in question, and that also before the order of February 13, 1914, was made, it appeared by reports on file that the action taken and authorized by the plaintiff had used up

substantially all the bankrupt estate, and that this in law was a participation by the plaintiff in the distribution of the estate under the bankruptcy proceedings.

8. The court should have found that the participation by counsel for plaintiff in the distribution of the estate pays and discharges an indebtedness of plaintiff to its counsel and is in legal effect a participation by the plaintiff itself.

9. The court, upon the undisputed facts, should have found that prior to the order of February 13, 1914, the plaintiff had participated.

10. The court, upon the undisputed facts, should have found that after the order and notwithstanding the order plaintiff participated.

11. The court erred in its finding or judgment that the question whether or not the plaintiff is in a legal sense a participant in the distribution of the estate of the bankrupt is foreclosed by the order of the bankruptcy court made on February 13, 1914.

12. The court erred in its finding or judgment that by the order of the bankrutcy court made on February 13, 1914, the claim of the plaintiff is expunged from the list of claims and excluded from participating in the distribution of the estate of the bankrupt under such bankruptcy proceedings.

13. The court erred in its finding or judgment that the order last above mentioned covers the matter in controversy.

14. The court erred in its finding or judgment that the order last above mentioned is conclusive of the matter in controversy.

15. The court should have found that the procedure of

the bankruptcy court afforded no opportunity to litigate the order in question.

16. The court should have found that plaintiff had already participated in the distribution of the estate and no order that plaintiff might put upon the record without notice and without a hearing could change that fact.

17. The court should have found that the order does not pretend to deny or change the fact that plaintiff had already participated.

18. The court should have found that the effect of the *ex parte* order so voluntarily entered is that plaintiff holds on to what it has already received or used up and assigns to the other claimants its share of whatever may remain.

19. The court should have found that there is no attempt to collaterally attack the order whereby plaintiff voluntarily orders himself excluded from further participation, the point being that he had already participated and, notwithstanding the order, afterwards again participated.

20. The court should have found that the order at most is a restraining order, directing the plaintiff not to participate; that the order is not collaterally attacked when it is shown that the plaintiff had already participated, and that a contempt may be shown, but there is no collateral attack in showing that afterwards, and in spite of the order, there was a participation.

21. The court erred in affirming the judgment for the plaintiff.

22. The court should have reversed the judgment.

Brief of the Argument.

1. The only assets in the possession of the defendant are the proceeds of insurance policies awarded to her by the bankruptcy court pursuant to the judgment of the Supreme Court of the United States.

2. The participation by counsel for plaintiff in the distribution of the estate pays and discharges to some extent an indebtedness of the plaintiff to its counsel and is in legal effect a participation by the plaintiff itself.

3. The plaintiff specially participated in the distribution of this estate under the bankruptcy proceedings.

4. The question whether or not the plaintiff participated is not foreclosed by the order of February 13, 1914.

5. The plaintiff is estopped from asserting that it withdrew its claim from the bankruptcy court.

6. The plaintiff's participation in the bankruptcy proceedings entitles the defendant to hold, own, and carry the assets in her hands free from the claim of the plaintiff.

7. As the defendant is entitled to hold these assets free from the claims of the plaintiff, the defendant, under the stipulation, is entitled to judgment.

8. The plaintiff's claim that it is a legatee under the will of Benajah D. Andrews, and therefore entitled to maintain this suit, is likewise without foundation.

ARGUMENT.

I.

The only assets in the possession of the defendant are the proceeds of insurance policies awarded to her by the bankruptcy court pursuant to the judgment of the Supreme Court of the United States.

It is stipulated that the only assets in the possession of the defendant are the proceeds of two insurance policies, one in the New England Mutual Life and the other in the Reserve Loan Life.

Transcript of Record, page 2, bottom line.
Transcript of Record, page 3, lines 1 and 2.
Transcript of Record, page 3, paragraphs 13 and 14.
Transcript of Record, page 1, par. 2.

Judge Rellstab, sitting in the bankruptcy court, first awarded these assets to the defendant against the trustee in bankruptcy, and this court later sustained the title of the executrix thereto.

Transcript of Record, pages 4 and 5, par. 20.
Andrews *vs.* Partridge, 228 U. S., 479.

II.

The participation by counsel for plaintiff in the distribution of the estate pays and discharges to some extent an indebtedness of the plaintiff to its counsel and is in legal effect a participation by the plaintiff itself.

Here the plaintiff instituted the bankruptcy proceedings and was indebted to Messrs. Bleakly & Stockwell, its attorneys, for their services in the matter. The indebtedness,

whether liquidated by agreement or not, was one which could be collected by suit.

While the statute provided for an allowance for such service, it was an allowance "to the petitioning creditor."

Bankruptcy act, section 64*b* (3).

District Judge Purnell, in construing this part of the statute, said:

> "The question arises, What did Congress mean by the provision quoted? It certainly did not mean to encourage the taking of cases on contingent fees, or speculating on what the court might allow." * * * "The statute does not authorize the payment of any fee to an attorney, but expressly says, *to the petitioning creditors*, to the bankrupt while performing the duties in involuntary cases and in voluntary cases as the court may allow. The allowance *evidently is intended to reimburse the petitioning creditors* and the bankrupt and not to encourage a speculative practice of the law."
>
> *In re* Young, 142 Fed., 891.

If it developed that the estate was absolutely without assets, the plaintiff would be obliged to pay this indebtedness to its attorneys without deduction or abatement. If, however, some assets were discovered sufficient to warrant an allowance, however small, to these attorneys, the indebtedness of plaintiff to its attorneys would to the extent of such allowance be paid or reduced.

Here the allowance made and paid was $50.

Transcript of Record, page 7, par. 33.

Certainly to this extent a debt due and owing from the plaintiff was paid or reduced, and to this extent the plaintiff participated in the distribution of the estate.

III.

The plaintiff participated in the distribution of this estate under the bankruptcy proceedings.

Entirely apart from the allowance to its counsel, the plaintiff participated.

It presented its claim to the referee in bankruptcy and the claim was duly allowed.

Transcript of Record, page 2, par. 6.

It filed with the referee a letter of attorney in the official form, addressed to Messrs. Bleakly & Stockwell, the attorneys appearing for it in the instant suit.

Transcript of Record, page 2, par. 6.

Through these attorneys it selected the trustee.

Transcript of Record, page 3, par. 8.

The trustee thereupon selected these same attorneys as his counsel.

Transcript of Record, page 3, par. 9.

The trustee, by his counsel, then petitioned for leave to bring suit for the assets in question. Notice of the application was given to the plaintiff, who presented no objection, and the order was made.

Transcript of Record, page 4, paragraphs 17, 18, and 19.

Suit was then brought by the trustee for these assets, and the matter was litigated through to this court, with the result that substantially all of the bankrupt estate was used up in the litigation.

Transcript of Record, pages 4, 5, and 6.

The trustee filed his petition, report, and account, showing that he had unsuccessfully carried on the litigation so authorized, stating his receipts and disbursements, and showing a balance of $921.73.

Transcript of Record, page 6, paragraphs 25 and 26.

Counsel for the trustee thereupon petitioned for $600 of this $921.73. Bleakly & Stockwell, also as attorneys for the petitioning creditors, including the present plaintiff, asked for an allowance of $50.

Transcript of Record, page 6, paragraphs 27 and 28.

The trustee and referee also had to be paid out of this $921.73. Notice of all this was given to the plaintiff, to whom it was apparent that the litigation which plaintiff had instituted, and the attorneys and agents for plaintiff, had so used up the bankrupt estate that virtually nothing would be left to come to plaintiff personally.

Transcript of Record, page 6, paragraphs 29 and 30.

In order to avoid, if possible, the effect of what plaintiff, either personally or through its attorneys and agents, had done in using up the bankrupt estate, the plaintiff pretended to withdraw from the bankruptcy proceedings, and on its own motion had an order entered excluding it from participating in the distribution of the bankrupt estate.

Transcript of Record, page 7.

The bankrupt estate was then wound up, after making allowances to the trustee, his counsel, and to counsel for the petitioning creditors, including the plaintiff.

Transcript of Record, page 7, paragraphs 32 and 33.

IV.

The question whether or not the plaintiff participated is not foreclosed by the order of February 13, 1914.

A. *It is a forward-looking order and does not attempt to assert that plaintiff had not already participated.*

There is not even a pretense that the plaintiff has not participated.

The effect of the *ex parte* order is that the plaintiff holds on to what it has already received or used up, and assigns to the other claimants its share of whatever may remain.

B. *Prior to the order the plaintiff had participated.*

As indicated under subdivision III, the plaintiff had already participated, and no order that plaintiff might put upon the record without notice and without a hearing could change that fact; but, as already noted, the order does not pretend to deny or change that fact.

C. *After the order and notwithstanding the order, the plaintiff still participated.*

Counsel for the plaintiff were afterwards paid out of the fund.

At most, the order is a prohibition against participating. It would be absurd to say that an order made February 13, 1914, could be an adjudication that the plaintiff did not in fact participate later on.

D. *The procedure of the bankruptcy court afforded no opportunity to litigate the order in question.*

This was an order on the motion of the plaintiff formally consented to by himself.

State of the case, page 11, lines 1 to 30.

The procedure of the court afforded no opportunity to litigate such an order, and therefore it does not come within the cases cited by the court below in its opinion.

In Shearman *vs.* Cameron, 78 N. J. Eq., 532, at page 537, the court says:

> "The legal question is whether the procedure of the court afforded an opportunity to litigate, not whether the parties concerned availed themselves of it."

E. *The order is not collaterally attacked.*

It was so held, when a similar order was disregarded, in Reeve *vs.* Kernan, 85 N. J. L., 641.

By the order, the plaintiff voluntarily orders himself excluded from further participation.

The order is at most a restraining order, directing the plaintiff not to participate. It is not collaterally attacked when it is shown that the plaintiff had already participated; and while it may show the plaintiff to be in contempt of the bankruptcy court, there is no collateral attack in showing that afterwards, and in spite of the order, there was a further participation.

Indeed, if there was any attack upon the order, it was a direct one by the referee himself in afterwards permitting the plaintiff to participate. Perhaps this works a revocation or rescission of the order.

V.

The plaintiff is estopped from asserting that he withdrew his claim from the bankruptcy court.

The adjudication in bankruptcy was on April 4, 1910.
Transcript of Record, page 2, par. 5.

The claim was presented April 28, 1910.
Transcript of Record, page 2, par. 6.

The year for presenting an application for a discharge expired April 28, 1911.
Bankruptcy act, section 14*a*.

The attempt to withdraw the claim was on February 13, 1914.
Transcript of Record, page 7.

Under section 70*a* (5) of the bankruptcy act, no discharge was needed against a creditor participating in the bankruptcy proceedings, and no application for a discharge was made.
State of the case, page 4, lines 30 to 35.

Plaintiff could not participate in the bankruptcy matter until it was too late to apply for a discharge and then be heard to say he had withdrawn his claim. He is as much estopped as was the plaintiff in Reeve *vs.* Kernan, 85 N. J. L., 641.

VI.

The plaintiff's participation in the bankruptcy proceeding entitles the defendant to hold, own, and carry the assets in her hands free from the claim of the plaintiff.

The language of the bankruptcy act is as follows:

> "That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, *he may*, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and *continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings.*"
>
> Bankruptcy act, section 70*a* (5).

It will be noticed that this is an exemption of a peculiar kind of property.

A discharge under section 17 of the act is a release from the debts therein mentioned. But, with or without a discharge, section 70*a* (5) gives the absolute right to hold the assets in question free from the claims of creditors, such as the plaintiff, who have participated in the bankruptcy proceedings.

The rule for construing statutes granting exemptions is to give them the most liberal construction which the courts can possibly give them, the courts taking the ground that, since the statutes have a beneficial object, it is their first duty to see that this object is accomplished.

18 Cyc., 1380 and 1381.

In construing the insurance exemption the court should, if need be, stretch the words so as to carry out the congres-

sional intent, rather than try to see if the language is not capable of a construction that will deny the right.

The Circuit Court of Appeals for the Third Circuit fell into the error of giving this provision a narrow construction in the litigation between the trustee in bankruptcy and this executrix over this very fund.

Partridge *vs.* Andrews, 191 Fed., 325.

Judge Rellstab gave it a broad and liberal construction, and in so doing was sustained by this court.

Andrews *vs.* Partridge, 228 U. S., 479.

This court, in an opinion filed April 28, 1913, held that this proviso was additional legislation and not intended to have the usual and primary office of a proviso, which is to limit generalities and exclude from the scope of the statute that which would otherwise be within its terms. Mr. Justice Day, speaking for the court, in addition said:

> "Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive. In passing this statute Congress intended, while exacting this much, that when that sum was realized to the estate the bankrupt should be permitted to retain the insurance which, because of advancing years or declining health, it might be impossible for him to replace. It is the two-fold purpose of the bankruptcy act to convert the estate of the bankrupt into cash and distribute it among creditors and then to *give the bankrupt a fresh start with such exemptions and rights as the statute left untouched.* In the light of this policy the act must be construed. We think it was the purpose of Congress to pass to the trustees that sum which was available to the bankrupt at the time of bankruptcy as a cash asset, otherwise to leave to

the insured the benefit of his life insurance." * * * "As we have construed the statute, its purpose was to vest the surrender value in the trustee for the benefit of the creditors and not otherwise to limit the bankrupt in dealing with his policy."

Burlingham *vs.* Crouse, 228 U. S., 459.

On the same day and upon the principles so laid down, the only asset which she has was adjudged to defendant by this court.

Andrews, executrix, *vs.* Partridge, 228 U. S., 479.

Section 70*a* (5) requires only a participation in the distribution of the *"estate under the bankruptcy proceedings."* That bankrupt estate is nothing more than the property, much or little, which the trustee received. If that property has been used up by the trustee in his litigation before the Supreme Court of the United States and the lower courts, it must be assumed that it was so used for the plaintiff's benefit.

Plaintiff has surely participated in the bankruptcy proceedings. To participate means to take part, to share in common with others.

Reardon *vs.* State, 4 Tex. App., 602-611.

It was not necessary that any money should actually reach the plaintiff. It was entitled to participate and did participate in both the successes and the failures of the trustee. Between the plaintiff and the fund stood the trustee, the trustee's attorneys, and also the plaintiff's attorneys, all of whom were plaintiff's agents. Plaintiff wanted to chance the estate upon the success of this litigation. It was entitled to receive, and was entirely willing to accept, the benefit or fruit of these, its agents' acts. If the agents were unsuccessful and because of expenses of administration and charges by these agents for professional services the sum remaining which could come to the plaintiff amounts only to a few cents, the right to receive

which it renounces, the plaintiff still participates in its distribution.

It is only by declaring that the defendant holds these assets free from the claim of the plaintiff that the congressional intent can be carried out.

VII.

As the defendant is entitled to hold these assets free from the claims of the plaintiff, the defendant, under the stipulation, is entitled to judgment.

The stipulation provides that if the court, upon the facts admitted, shall find that the defendant is entitled so to hold the assets in question, then judgment final as to the whole case shall be entered for the defendant.

Transcript of Record, page 1, par. 2.

VIII.

The plaintiff's claim that it is a legatee under the will of Benajah D. Andrews, and therefore entitled to maintain this suit, is likewise without foundation.

A legatee cannot maintain such a suit as this.

The conclusive answer, however, is that the moneys in the hands of the executrix came not from the testator, but from the law itself.

The only asset is the fund obtained through the construction given by this court to the exemption clause in the bankruptcy act.

Transcript of Record, pages 2 and 3, par. 7.

Andrews, executrix, *vs.* Partridge, 228 U. S., 479.

Many of the cases go upon the theory that the testator can give his widow an inconsistent devise and put her to her election as to whether she will take it or the exemption. Here, however, there is no inconsistent devise. Everything within the reach of creditors is vested in the trustee in bankruptcy. Nothing remained but the right to pay the surrender value and claim this exemption. The testator did not do this in his lifetime, and consequently nothing passed by the will.

This court has held that the right did not die with the bankrupt, but passed to his personal representative.

Andrews *vs.* Partridge, 228 U. S., 479.

The personal representative therefore takes the right not from the testator, but from the law itself. The property thus acquired is held by the personal representative in trust to carry out the purposes of the act of Congress, which were to give the bankrupt and those dependent upon him—

> "a fresh start, with such exemptions and rights as the statute left untouched."
>
> Burlingham *vs.* Crouse, 228 U. S., 459.

Another familiar instance of property passing to the personal representative being held in trust and beyond the reach of creditors is money recovered under the death act.

2 N. J. Comp. Stat., 1908, par. 8.

It would have been absurd for Congress to go to the trouble that it did to take property away from all pre-existing creditors if it had intended then to give this property to a selected few of such pre-existing creditors. Subsequent creditors only were to be benefited, for it was to give a "fresh start."

This view is supported by a number of cases concerning State exemptions.

The Supreme Court of Texas says:

> "These allowances are creatures of the statute, based upon the wise policy of securing to the widow and children temporary support and reasonable means with which to begin anew the contest for subsistence, and are wholly independent of the will of the testator. If the parent can deprive the children of these allowances by devising his property to his wife, we see no good reason for holding that he cannot do so by devising it to a stranger *in trust for the benefit of his creditors.* This would thwart the very purpose and policy of the statutes."
>
> Wooley *vs.* Sullivan, 92 Tex., 28; 45 S. W., 381.

The Supreme Court of Alabama declares:

> "Exemptions of personalty and of homestead are not susceptible of being affected by testamentary disposition. They are creations of law and cannot be altered or defeated by testamentary provision."
>
> Richter *vs.* Richter, 60 So., 880-882.

In Pennsylvania it is said the husband is powerless by testamentary provision to prevent his wife "from freely exercising the right vested in her by the law itself."

In re Peebles Estate, 157 Pa., 605; 27 Atl., 792.

See also Lowe *vs.* Lowe, 146 S. W., 100; 163 Mo. App., 209.

Conclusion.

The plaintiff cannot, through its attorneys and agents, use up all the bankrupt estate and then be heard to say, "I won't share in its distribution." The plaintiff has participated in the distribution of the estate under the bankruptcy proceedings, defendant holds the assets in question free from the claim of the plaintiff, and by the stipulation judgment should have gone for the defendant.

The New Jersey Supreme Court erred in placing the interpretation which it did upon the bankruptcy act of the United States and in deciding against the title, right, privilege, or exemption specially set up and claimed by the defendant under the statute, and the Court of Errors and Appeals likewise erred in affirming the judgment. The judgment should therefore be reversed.

All of which is respectfully submited.

THOMAS E. FRENCH,
SAMUEL H. RICHARDS,
Counsel for Plaintiff in Error.

Supreme Court of the United States

HANNAH L. ANDREWS, executrix of Benajah D. Andrews, now deceased,

Plaintiff in Error,

vs.

JOHN NIX & COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This writ of error reviews a judgment of the New Jersey Court of Errors and Appeals affirming a judgment of the New Jersey Supreme Court in favor of John Nix & Company vs. Hannah L. Andrews, executrix, in the sum of $13,880.07. The case was presented to the State Supreme Court upon an agreed state of facts embodied in a written stipulation of counsel for the parties (Transcript of Record, page 1), and under Rule No 150 of said State Court providing for the hearing of "cases agreed between the parties without trial." John Nix & Company, the plaintiff in the court of first instance and defendant in error in this court (we shall in this brief style it the plaintiff, to conform to opponent's

brief), was a creditor of Benajah D. Andrews and the suit was against Hannah L. Andrews, his executrix.

An involuntary petition in bankruptcy was filed against Benajah D. Andrews February 3, 1910.

He died February 15, 1910, leaving a will in which defendant was made executrix. He was adjudged a bankrupt by the United States District Court for the District of New Jersey April 4, 1910. The debts of the bankrupt aggregated over $80,000.00 (Transcript of Record, page 3). The total moneys of the estate received by the Trustee were $1,849.00; $2,905.87, less $1,056.40 not belonging to the estate. (Transcript of Record, page 6, section 24.)

The dividend actually paid the creditors upon distribution of the estate was .0136 per cent.

Neither the bankrupt in his life time nor his legal representatives after his death obtained a discharge under the Bankruptcy Act. (Transcript of Record, page 3, section 11.)

At the time of the filing of the petition in bankruptcy against Andrews, he had outstanding certain policies of life insurance upon his life, one of which was for $5,000.00, in the Reserve Loan Mutual Life Insurance Company, and *payable to his estate*; another policy in the New England Mutual Life Insurance Company was for $10,000.00, and payable to the executors, administrators or assigns of said bankrupt; and a third policy in the Philadelphia Mutual Life Insurance Company was for $10,000.00 and *payable to his wife*, Hannah L. Andrews, with the right reserved in Andrews to change the beneficiary. There were also ten policies of $1,000.00 each in the Fidelity Mutual Life Insurance Company of Philadelphia, *payable to his wife*, Hannah L. Andrews, with the right reserved in Andrews to change the beneficiary. (Transcript of Record, pages 3 and 4, sections 13 to 17.)

Upon the death of the bankrupt the proceeds of the policies, which were payable to the wife of the bankrupt, were paid to the wife. The Trustee in Bankruptcy, however, claimed for the bankrupt estate the proceeds of the policy made payable to the bankrupt's estate and the proceeds of the policy made payable to the executors, administrators and assigns of the bankrupt. The United States District Court decided this claim adversely to the Trustee; upon appeal to the Circuit Court of Appeals for the Third Circuit, the lower Court was reversed in an opinion holding that the proceeds of these two policies belonged to the Trustee in the Bankruptcy Court.

There having occurred at about the same time in another Circuit of the United States Court a somewhat similar case, and the Circuit Court of Appeals for that Circuit having filed an opinion at variance with the opinion filed by the Circuit Court of Appeals in Andrews case, there was made possible a review by the United States Supreme Court of Andrews case, which resulted in an opinion by this Court reversing the Circuit Court of Appeals in the Andrews case, and affirming the decree of Judge Rellstab of the District Court.

The plaintiff was one of three creditors who filed the involuntary petition in bankruptcy against Andrews. After adjudication of the bankrupt, plaintiff filed its claim in the Bankruptcy Court. Before the payment of any dividend upon this bankrupt estate, however, the plaintiff withdrew its claim from the Bankruptcy Court by leave of that Court, and an order was entered by said Court, directing that plaintiff's claim be expunged from the list of claims, and that the plaintiff be excluded from participating in the distribution of this bankrupt estate. (Transcript, pages 6 and 7, sections 30 and 31.)

Inasmuch as neither Benajah D. Andrews, bankrupt, nor his legal representatives, had procured a discharge in the Bankruptcy Court, the plaintiff exercised its legal

right of presenting its claim to the executrix named in the will left by Benajah D. Andrews. Upon the filing of plaintiff's claim with said executrix, the claim was disputed and plaintiff was required to bring suit within the time limited by the New Jersey statute. The suit in the Supreme Court by the plaintiff against the defendant was the result.

Under the agreed state of facts, represented by the stipulation between counsel (Transcript, pages 1 to 8, inclusive), the merits of the plaintiff's claim are no longer contested.

Under that stipulation the State Supreme Court was obliged to enter judgment for the plaintiff unless the defendant, as executrix of Benajah D. Andrews, deceased:

> "Was entitled to hold exempt and free from the claim of the plaintiff in declaration set forth, the proceeds, less the surrender value thereof, of testator's life insurance policies hereinafter mentioned, payable to his executors, administrators and assigns, in the New England Mutual Life Insurance Company, and in the Reserve Loan Life Insurance Company."
>
> (Transcript, page 1, section 2.)

It is the contention of counsel for the executrix that the proceeds of the policies named (less the surrender value of $114.93, paid to Trustee), are exempt and free from the claim of the plaintiff under Section 70-A (5) of the Bankruptcy Act upon the theory that the plaintiff has participated in the distribution of the estate under the bankruptcy proceedings.

BRIEF OF ARGUMENT.

1. The merits of plaintiff's claim are not contested and it is entitled to its judgment unless the proceeds of certain life insurance policies in the hands of the defendant are exempted from the claim of the plaintiff under Section 70-A (5) of the Bankruptcy Act.

2. The case is not within the exemption set out in Section 70-A (5) in that plaintiff is not a creditor who "participated in the distribution of the bankrupt's estate under the bankruptcy proceedings."

(a) Neither the bankrupt nor his personal representatives applied for or secured a discharge under the Bankruptcy Act.

(b) Plaintiff did not "participate in the distribution of the estate under the Bankruptcy proceedings," but the United States Court entered an order forbidding such participation and expunging its claim from the claims entitled to participate.

3. Mr. Andrews, the bankrupt, by his voluntary insertion in his will of a positive direction to his executrix to pay all his just debts, waived any exemption he or his legal representatives might otherwise have claimed under Section 70-A.

4. The decision of this court in Andrews vs. Partridge, 228 U. S., 479, does not dispose of this case, but merely awarded the moneys to the defendant as executrix, subject to distribution by the Orphans' Court of Burlington county, New Jersey.

5. Plaintiff is not barred of his action against the defendant by any estoppel.

ARGUMENT.

I.

The merits of plaintiff's claim are not contested. It was entitled to judgment in the State Supreme Court and that judgment was properly affirmed by the New Jersey Court of Errors and Appeals, unless the facts bring the case within the proviso clause of Section 70-A (5), of the United States Bankruptcy Act, reading as follows:

> "Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the Trustee by the company issuing the same, pay or secure to the Trustee, the sum so ascertained and stated, and continue to hold, own and carry such policy **free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings,** otherwise the policy shall pass to the Trustee as assets."

Furthermore, to bring the case within this proviso clause, the plaintiff must have "participated in the distribution of his (bankrupt's) estate under the bankruptcy proceedings."

II.

Plaintiff did not "participate in the distribution of the estate of Benajah D. Andrews under the Bankruptcy Proceedings" within the meaning of the Bankruptcy Act.

1. Plaintiff's only connection with the bankruptcy proceedings was as follows:

Plaintiff joined with two other creditors of the bankrupt in filing under the Bankruptcy Act an involuntary petition.

It filed its claim with the Referre in Bankruptcy and that claim was allowed.

Upon formal application for that purpose, an order was made February 13, 1914, by the United States District Court expunging its claim from the list of claims in the bankruptcy estate, and excluding plaintiff "from participation in the distribution of the estate of said Benajah D. Andrews, a bankrupt, under said Bankruptcy proceedings." (Transcript, pages 6, 7; section 30, 31.)

It is admitted that plaintiff's claim was withdrawn and expunged from the list of claims in the Bankruptcy Court before any dividend was paid or declared, and before any allowances were made for the administration of said estate, and that plaintiff received no dividend from said Bankruptcy Court. (Transcript, pages 6, 7; sections 30, 31.)

In order to avoid the legal effect of the order of the United States District Court of February 13, 1914, excluding the plaintiff from participation in the distribution of this estate, defendant urges upon this Court that the order in question does not conclude her and in fact was not binding upon her. It is claimed that this order should be disregarded because it is asserted that the Bankruptcy Court "afforded no opportunity to litigate the order in question," and that at most the order was a "restraining order," and that "she is not now endeavoring to attack collaterally in this order."

This order of February 13, 1914, by the United States Court stands unchallenged in that Court. There is nothing in the agreed state of facts which warrants any assump-

tion that that order was improperly entered. The order speaks for itself. It was made on formal application by plaintiff to the Court. The stipulation does not justify a statement that the defendant was without knowledge of the entering of the order. Even if defendant were interested in such an order there is no showing in the stipulation that she was either in ignorance of the order or that she was without opportunity to take action in the District Court with reference to it. In this connection, it should be remembered that the stipulation covers all of the facts upon which judgment was entered below and upon which the case is here presented. Upon that state of facts, we must assume that the order of the United States Court in question was properly made. The defendant does not challenge the jurisdiction of that Court to make the order. The stipulation expressly shows that a formal application was made and the order was entered and that it stands unchallenged by the defendant, except collaterally on this writ of error.

Defendant urges that the procedure of the Bankruptcy Court afforded her no opportunity to litigate the order in question. If, for argument, we assume that to be true, how then can that judgment of the United States Court be questioned collaterally in another Court? In stating that "plaintiff voluntarily orders himself excluded from further participation," defendant presents no argument, but merely casts a slur upon the Court making the order.

Counsel have cited in their brief Reeve vs. Kernan, 85 N. J. L., 641, to support their proposition that they are not attacking collaterally the United States Court order of February 13, 1914. We find nothing in the cited authority applicable to the present case. Reeve was a sub-contractor for McGraw Company. The latter was adjudged a bankrupt and Reeve claimed a preferential lien upon the funds of the estate by reason of his "stop notice" served under the New Jersey Mechanics' Lien Law. He filed his

claim with the Bankruptcy Court expressly setting up the preference. After this claim had been filed, the Trustee applied to the owner and received from the owner the amount due to Reeve and others under the "stop notices." The money was, therefore, in the United States Court and subject to the lien of the plaintiff and for distribution according to the law in such cases. Reeve, however, sought to withdraw from the Bankruptcy Court. That Court would not permit him to withdraw but retained jurisdiction over the case. Reeve sued on his "stop notice" in the State Court and was properly non-suited, inasmuch as another Court already had lawful jurisdiction of the subject matter.

The authorities cited in the case of Reeve vs. Kernan, merely show that, where a competent Court has already acquired lawful jurisdiction over the subject matter, a State Court will not interfere.

The rule is stated in Pickens vs. Roy, 187 U. S., 178, as follows:

> "The Court which first obtains rightful jurisdiction over the subject matter should not be interfered with."

In the present case, the plaintiff withdrew from the United States Court with the consent and by express order of that Court.

2. Defendant urged in the State Courts and now contends in this Court that certain other proceedings in the Bankruptcy Court amounted to a participation by the plaintiff therein, as follows:

The claim is made that the attorneys for the petitioning creditors in the bankruptcy proceedings received an allowance of $50.00 and that the attorneys for the Trustee received an allowance of $350.00.

Defendant in her brief also asserts that plaintiff "used up" the funds of the estate in litigation over the policies. There is nothing in the agreed state of facts to justify this assertion. The total moneys of the estate received by the Trustee were $1,849.00. (Transcript, page 6, section 24.) This amount was reduced by disbursements for liens, etc., and by the payment of the ordinary expenses of administration, and left for distribution among the creditors the sum of $921.73.

Nor were the funds "used up" by litigation over the insurance policies. The fact is, that the expense of such litigation amounted to $139.75. (Stipulation, Transcript, page 6, section 25.) Counsel for the Trustee (John D. McMullin and Bleakly & Stockwell), applied for an allowance of $600.00 as counsel for the Trustee. The Court allowed only $350.00, which was divided equally between John D. McMullin and Bleakly & Stockwell. (Transcript, page 8, section 34.)

In short, the Court disregarded the question of litigation on the application for counsel fees because of the smallness of the estate. The work involved in carrying the litigation through three Courts, including the United States Supreme Court, would have justified a much larger allowance than the amount asked for, if the estate had had the funds with which to pay.

Plaintiff was not responsible for the litigation, and had no control over it. The Trustee would have been remiss in his duty if he had not, upon the admitted facts, asserted a claim to this large fund.

There is nothing in the record to show that even counsel for plaintiff participated. Plaintiff's attorneys did no more than set the machinery of the law in motion by acting for the plaintiff and sundry other parties in filing an involuntary petition against Mr. Andrews. There is no evidence that the plaintiff was ever represented in the bankruptcy proceedings except upon the occasion of en-

tering the order expunging the claim. It is incorrect to say, either that plaintiff was indebted to attorneys for filing the petition, or that the plaintiff had participated simply because at the close of the estate a small compensation was allowed to the attorneys for filing the involuntary petition. At most, this could be no more than a reimbursement to plaintiff and other petitioning creditors for a small expense incurred on behalf of all creditors.

The Court's attention should be directed to the fact that the attorneys who filed the involuntary petition were merely joint attorneys with John D. McMullin, Esquire, in representing the Trustee.

In short there is no basis whatever for the defendant's charge that "substantially all the bankrupt estate was used up in the litigation" or that plaintiff had instituted the litigation, or that the "attorneys and agents for plaintiff had so used up the bankrupt estate that virtually nothing would be left to come to defendant personally."

3. THE ACTIONS OF THE PLAINTIFF AND THE PROCEEDINGS OF THE BANKRUPTCY COURT REFERRED TO BY THE DEFENDANT DO NOT AMOUNT TO A "PARTICIPATION."

The "participation" referred to in the Act is in "the distribution of his estate." It is not a participation in some general way in the bankruptcy proceedings; the reference is specifically to "distribution."

There is a clear distinction in the administration of estates between collection of assets and the reduction of property to money, and the "distribution" of that money.

The collection of the estate is a necessary preliminary to its distribution—but is not itself the distribution.

Justice Day, of this Court, in Burlington vs. Crouse, (228 U. S., p. 473), said:

> "It is the two-fold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among the creditors, and then give the bankrupt a fresh start with such exemptions and rights as the statute left untouched."

The New Jersey Supreme Court held in (Wheaton vs. Andrews, 89 Atl. Rep., p. 226), that the making of a proof of claim in bankruptcy proceedings merely "imports participation in the distribution of the estate."

> "Proof of the claim entitled it to allowance unless objection is made (Section 57-C), a dividend follows as of course. We think it is for plaintiff to set up by the way of avoidance any facts showing that the claim has not taken the usual course, and that the statement that the claim is true, prima facie, imports participation in the distribution of the estate."

The cited case is still pending in the State Supreme Court. It has not been brought to trial pending a decision by this Court in the present cases.

The stipulation governing this suit expressly shows that the claim did "not take the usual course" and that the plaintiff did not participate.

The word "distribution," according to Bouvier's Law Dictionary, means:

> "The division, by order of the Court having authority, among those entitled thereto, of the personal estate of an intestate, after payment of the debts and charges."

In Thompson vs. Tracey, 60 N. Y., p. 179, the Court defines "distribution" as follows:

> "In general, the term "distribution" when applied to the estate of a deceased person, refers to the ultimate division of the estate among the next of kin, in case of intestacy, among the beneficiaries under the will, after the estate is free from debt."

Any doubt as to the meaning of the words "participating in the distribution" is to be resolved in favor of the plaintiff—not in favor of the defendant.

In some respects statutes creating an exemption are to be liberally construed, but only to give effect to the exemption within its clear and admitted limits. Whether an exemption, in derogation of the rights of another actually exists as against him is a question to be answered strictly accordingly to the words of the statute; and the presumption is against it instead of in favor of it.

In 36 Cyc., 1179, it is said:

> "Therefore, except in those jurisdictions where the rule has been changed by enactment, all statutes in derogation of the common law are to be construed strictly. Where the statute not merely effects a change in the common law, but is also in derogation of common rights, it must be construed with especial strictness."

In the case of Rue vs. Alter (5 Denio, 120), the Court said:

> "Besides, statutes exempting a debtor's property from the payment of his debts are not remedial in the ordinary sense, so as to require them to be construed with any peculiar liberality. They are in derogation of the common law and confer immunities and privileges contrary to its general maxims."

In the case of Coddington, et al., vs. Dry Dock Company (31 N. J. L., 479), the Court of Errors and Appeals was asked to give a liberal construction to the Mechanics' Lien Law on the ground that the statute was remedial. It was argued that the Court should hold that a dry dock was a building. The Court refused to stretch this meaning of the term "building." The Court said (page 479):

> "It has been remarked that this is a remedial statute and should be construed liberally. So far as it is remedial, that is all true. But this statute also creates new rights and so far it should be construed strictly. This statute, when it makes one man's debt a lien on another man's land, is not giving a new remedy but creating a new right, and for us to multiply the objects subject to this lien, by way of liberal construction, is being very liberal with other people's property. In ascertaining whether this floating dock is a building, within the meaning of the Act, we are only to inquire what the Legislature meant by the term building."

To construe the term "participating in the distribution of the estate" liberally, so as to deprive plaintiff of its just claim upon the assets in the hands of the executrix, is also "being liberal" with other people's property. Not only were those insurance policies maintained by the bankrupt during a period when he was heavily indebted to the plaintiff, but he made the two policies payable to this estate, and in his will again set their proceeds aside to answer, first of all, for his debts.

Defendant asserts that the Supreme Court of the United States gave a liberal interpretation to the provision in the statute relating to the payment of the surrender value of the policies, and that the Circuit Court erred in not giving that provision a liberal interpretation.

We think the fact is otherwise. The Supreme Court of the United States did not reverse the Circuit Court of Appeals because the latter failed to interpret the statute liberally, but because it failed to interpret it accurately. The interpretation given to the statute by the Supreme Court of the United States was not given because it was a more liberal interpretation, but because, in the judgment of the Court, there were positive indications in the Bankruptcy Act that the time at which the surrender value should be ascertained was the date of the petition and not the date of adjudication. There will not be found, we believe, in the opinions of the Supreme Court dealing with this section of the Bankruptcy Act, any foundation for the argument that the Supreme Court has "stretched" the meaning of the statute.

Defendant's contention would destroy the admitted distinction between the exemption afforded insurance policies and that afforded by a discharge.

Bankruptcy proceedings are for the benefit of all bankrupt creditors. The cost and expenses of administering the estate are, on plaintiff's theory, so much money caused to be expended not only in the interest of petitioning creditors but in the interest of all creditors that might have come into the proceedings, whether or not, in fact, they proved their claims or received anything out of the estate. They could have come in and claimed a dividend just as the plaintiff might have stayed in and claimed a dividend—what was done was done for all. Thus, on defendant's theory, all creditors must be held to have participated in the distribution of the bankrupt estate; and the exemption as to life insurance policies is made coextensive with that granted in the case of a discharge. But this clearly cannot be so. The Act draws a clear distinction between the two forms of exemption, making that in respect to policies depend upon participation in the distribution of the estate, and that in respect to a dis-

charge depend upon the appearance or notice to appear of the debt. We contend that defendant's theory of what constitutes participating in the distribution of the estate would destroy the admitted distinction between the two forms of exemption.

In our view, there is nothing in the Bankruptcy Act to support the theory that the words of that act "participating in the distribution of his estate under the bankruptcy proceedings" should be given any other than their plain meaning.

4. A CLAIM ONCE PROVEN IN BANKRUPTCY AND THEREAFTER WITHDRAWN IS IN PRECISELY THE SAME POSITION AS A CLAIM NEVER PROVEN.

It would not be contended by the defendant that the assets in defendant's hands are exempt from claims not proven in the bankruptcy proceedings in the absence of a discharge.

The full amount of the claim remains unpaid. The Bankruptcy Act expressly limits the exemption set up by defendant under Section 70-A to claims of creditors actually "participating in the distribution." It does not pretend to cover claims not proven, or claims once proven and thereafter withdrawn by order of Court.

A consideration of the Bankruptcy Act clearly shows the reason why the exemption afforded the proceeds of life insurance policies when the surrender value has been paid, is limited to creditors actually participating in the distribution.

The value of the bankrupt's life insurance policies at the time of bankruptcy may be said to be their cash surrender value. A creditor that actually enjoys a share of this surrender value receives a consideration which justifies the retention of the policy free from his further de-

mands; but the creditor that has not received a share of the surrender value of such policies is in a different position, and, in the absence of a discharge protecting the bankrupt from his debts, is not met with the objection that he has already received his share of the value of the policies.

The plaintiff never participated in the distribution of the bankrupt estate. The defendant's decedent and defendant herself, never obtained a discharge in bankrutpcy, and the exemption mentioned in Section 70-A (5) of the Bankruptcy Act is not applicable. This being so, the defendant is without any defense under the stipulation.

III.

BENAJAH D. ANDREWS, BY HIS VOLUNTARY INSERTION IN HIS WILL OF A POSITIVE DIRECTION TO HIS EXECUTRIX TO PAY ALL HIS JUST DEBTS, WAIVED ANY EXEMPTION HE OR HIS LEGAL REPRESENTATIVE MIGHT OTHERWISE HAVE CLAIMED UNDER SECTION 70-A (5).

The bankrupt had the right to pay the surrender value of the life insurance policies, and then hold those policies free from the claims of creditors who "participated in the distribution of his estate in bankruptcy."

That privilege was also extended to his personal representatives under certain conditions.

(Everett vs. Judson, 228 U. S., p. 428.)

Even if we should assume, for argument, that plaintiff had participated in the distribution as mentioned in Section 70-A (5), that would not necessarily relieve the exe-

cutrix from her duty to carry out the express terms of the will left by the bankrupt.

In the case of Partridge vs. Andrews (Supra), the United States Supreme Court allowed defendant, in her representative capacity as executrix, to receive the proceeds of the policies in question. In so doing, however, it did not authorize the executrix to ignore the voluntary and positive directions in the testator's will. Defendant somewhat confuses her official position as executrix with her personal interest as a widow who desires to receive this fund for her personal use.

The testator may impose upon his legal representative duties which the law would not place upon her. He may dispose of his property as he sees fit. He may direct his executrix to pay his just debts out of property which he could have held exempt. The direction of the testator to pay his debts will be given effect.

(Suydam vs. Voorhees, 58 N. J. Eq., 155.)
(McKinley vs. Coe, 66 N. J. Eq., 78.)
(Shreve vs. Shreve, 17 N. J. Eq., 494.)

Even if the bankrupt, by a discharge, had put himself in a position to take full advantage of such Section 70-A (5), he has denied to his executrix, by clear direction in his will, any right otherwise available under that Section. To perform her duty as executrix, to pay the decedent's debts, according to his directions, means that she must use the proceeds of these policies, because there are no other assets in her hands. The assets which have come to her hands are set aside by the express direction of her testator as a fund for the payment of his debts.

In this particular case, we can well understand why Mr. Andrews should have desired his executrix to carry out this clear direction in his will to pay debts. Mr. Andrews, even before a petition in bankruptcy had been filed, admitted in writing that he was unable to pay his

debts, and was willing that he should be adjudged a bankrupt.

From the papers in the cause filed in the United States District Court, the following full and correct copy of his statement is taken:

> "Moorestown, N. J., January 31, 1910.
> "I, Benajah D. Andrews, hereby admit in writing my inability to pay my debts and hereby express my willingness to be adjudged a bankrupt on that ground.
>
> (Signed) BENAJAH D. ANDREWS."

Not only did he state in writing his knowledge of his own insolvency, but this admission is verified by the records of the bankruptcy court as set forth in the stipulation. While Mr. Andrews left debts exceeding $80,000.00 in amount, he left assets of less than $2,000.00.

He unquestionably had in mind this very situation in making payable "to his executors," and "to his estate," the policies whose proceeds are involved in this litigation.

If the words in these policies, defining the beneficiary, mean anything, they must mean that Andrews desired to set apart the proceeds of these particular policies for the payment of his debt. Other policies in large amounts on Mr. Andrews' life were payable to his widow. The proceeds of the latter policies the widow has appropriated to her own use.

No power is given to the executrix to substitute her own judgment for that of the testator, and to say that she will not apply the moneys in this estate to the payment of the debts as her testator directed. When the executrix received the proceeds of the policies in question, she was simply acquiring assets to be applied by her in carrying out the provisions of her testator's will. The act of the defendant in paying the surrender value of the policies

($114.93), has no effect in the present case other than to transfer the proceeds of the policies to the Orphans' Court of Burlington County, New Jersey, to be administered under the directions of the testator's will.

This view of the case we conceive to be in harmony with established legal principles. It will also give effect to the intentions of the testator.

IV.

The decision of the United States Supreme Court in Andrews vs. Partridge, 228 U. S., p.479, in no way disposes of the present case.

The decision of the United States Supreme Court simply effected a division of the proceeds of the policies in question between the Trustee and the executrix. Each claimant was acting in a representative capacity; each was obliged to pay debts. What the executrix is consequently bound to do with the assets turned over to her in her representative capacity; whether plaintiff's previous connection with the administration of the estate in bankruptcy (without receiving any dividend or other payment therefrom) would, in any view, be construed as "participating" in the "distribution" of that estate; whether the express voluntary direction by testator in his will that his debts should be paid by his executrix does not establish plaintiff's right to judgment these questions were not presented and were not disposed of by this Court in Andrews vs. Partridge, either expressly or by implication.

Inasmuch as the proceeds of the two policies in the hands of the executrix are not exempt and free from the plaintiff's debts, therefore, under the stipulation governing this case, judgment was rightly entered for the plaintiff in the State Court, and that judgment should be affirmed in this Court.

V.

DEFENDANT CLAIMS AN ESTOPPEL.

The question of estoppel is not involved. None of the necessary elements to constitute an estoppel are present. Plaintiff acted within its lawful rights. It is not pretended that it made any representations to defendant. There is nothing in the record to show that the defendant neglected to apply for a discharge because of anything said or done by the plaintiff.

The question of estoppel did not arise in the case of Reeve vs. Kernan (Supra). The State Court recognized the rule governing the relations between Courts of concurrent jurisdiction, and simply refused to entertain a suit over subject matter which was already within the jurisdiction and under the control of the United States Court.

VI.

DEFENDANT SETS UP A POINT NEVER MADE BY PLAINTIFF AND THEN PROCEEDS TO ARGUE AGAINST IT.

We have never claimed that plaintiff is a *legatee under Andrews' will.* The following paragraph in defendant's brief is significant:

> "The property thus acquired is held by the personal representatives in trust to carry out the purposes of the Act of Congress, which were to give the bankrupt and those depending upon him a fresh start with such exemptions and rights as the statute left untouched."

Defendant's counsel then assumes that this gives to his client for her personal use the proceeds of the policies which were made payable to "his estate." The exemption clause (Section 70-A (5), gives the bankrupt a right to take and hold the policies themselves upon paying the surrender value of those policies. The surrender value of the policies was $114.93. This payment allowed the bankrupt to take and hold those policies, but not necessarily the proceeds of those policies. When Mr. Andrews made the policies payable to his "executors," and to his "estate," he simply meant that, upon his bankruptcy, he might, by paying a small surrender value, take and hold those policies during his life, but that at his death the proceeds of the policies would go to his personal representative (his executrix), to be administered in the Orphans' Court of Burlington County. Defendant confuses the policies themselves in the hands of the bankrupt with the proceeds derived from those policies after the death of the bankrupt.

Plaintiff, under the admitted facts and the legal principles applicable thereto, did not participate in the distribution of Andrews' estate under the bankruptcy proceedings, and, therefore, plaintiff was entitled to her judgment against the executrix. The judgment of the State Appellate Court should be affirmed.

Respectfully submitted,

EDWIN G. C. BLEAKLY,
HENRY F. STOCKWELL,
Attorneys for Plaintiff.

(25,223)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 437.

HANNAH L. ANDREWS, EXECUTRIX OF THE WILL OF BENAJAH D. ANDREWS, DECEASED, PLAINTIFF IN ERROR,

vs.

JOSEPH D. HENDRICKSON.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. FEBRUARY 2, 1917.

a N. J. Court of Errors & Appeals.

JOSEPH D. HENDRICKSON, Plaintiff and Respondent,

vs.

HANNAH L. ANDREWS, Executrix of the Will of Benajah D. Andrews, Deceased, Defendant and Appellant.

On Contract. Appeal from Supreme Court.

State of Case.

French & Richards, For Appellant.
Bleakly & Stockwell, For Respondent.

1 New Jersey Supreme Court.

JOSEPH D. HENDRICKSON, Plaintiff,

vs.

HANNAH L. ANDREWS, Executrix, &c., of Benajah D. Andrews, Deceased, Defendant.

On Contract.

Stipulation.

1. The parties to this cause, plaintiff and defendant, by their several attorneys, hereby agree that the following facts are admitted, and shall constitute a special case agreed between the parties without trial, regardless of the issues raised by the pleadings on file in the above cause, and shall be argued and submitted to the determination of the New Jersey Supreme Court upon said facts.

2. And it is further agreed that if, upon the facts so admitted and agreed to, the Court shall be of the opinion that the defendant, as executrix of Benajah D. Andrews, deceased, is entitled to hold, exempt and free from the claim of the plaintiff in the declaration set forth, the proceeds, less the surrender value thereof, of testator's life insurance policies hereinafter mentioned, payable to his executors, administrators and assigns, in the New England Mutual Life Insurance Company of Boston, and in the Reserve Loan Life Insurance
2 Company of Indianapolis, Indiana, then judgment final as to the whole case shall be entered for the defendant, with costs of suit; but if, upon the facts so admitted and agreed to, the Court shall be of the opinion that the defendant, as executrix of Benajah D. Andrews, deceased, is not entitled to hold the proceeds of said policies, less the surrender value thereof, exempt and free from said claim of the plaintiff, then judgment final as to the whole case, and for

the sum of ten thousand dollars ($10,000.00), with interest as claimed in his declaration, and costs of suit, shall be entered for the plaintiff; the right to turn said case into a special verdict or to take any other steps that may be advisable for purposes of review and the right to review the judgment thereon by appeal, writ of error, or other appropriate proceeding being reserved to each party, plaintiff and defendant. It is further stipulated and agreed by the attorneys for the respective parties that all rights, if any, to equitable relief in the Court of Chancery of New Jersey, in the matter of the collection of the plaintiff's claim herein mentioned, are reserved to the plaintiff to the extent that such rights, if any, are not lost by the prosecution of this suit in the Supreme Court, it being expressly stipulated that the defendant does not concede or recognize any such rights, and does not waive any defense either by way of statute of limitations, laches or otherwise, which she may have to the assertion by the plaintiff of any such equitable claim.

Facts Admitted.

3. On February 3, 1910, an involuntary petition in bankruptcy was filed in the District Court of the United States for the District of New Jersey by Read Phosphate Company, John Nix & Company and MacMurphy Company, creditors, against Benajah D. Andrews, the petitioning creditors being represented in the proceeding by Bleakly & Stockwell, their attorneys.

3 4. On February 15, 1910, said Benajah D. Andrews died, leaving a will, wherein and whereby his widow, Hannah L. Andrews, was appointed sole executrix and she duly qualified as such executrix.

5. On April 4, 1910, said Benajah D. Andrews was by said District Court adjudicated a bankrupt.

6. On April 28, 1910, said Joseph D. Hendrickson, the plaintiff, presented to and caused to be filed before S. Conrad Ott, Esq., the Referee in Bankruptcy, to whom the said bankruptcy cause had been referred, a proof of claim under oath, in writing, duly signed and in due form for the same cause of action in the declaration in this suit mentioned and declared upon, which claim was forthwith duly allowed, and also at the same time and place plaintiff filed with said Referee plaintiff's letter of attorney duly acknowledged or proven in accordance with the official form and addressed to E. G. C. Bleakly, or H. F. Stockwell, the said addressees being partners practicing law as Bleakly & Stockwell.

7. All defenses, if any, to the plaintiff's said claim, in his declaration set forth, are expressly waived and abandoned by the defendant except the contention by way of defense that the defendant, as executrix of the said Benajah D. Andrews, is entitled to hold the proceeds of said policies mentioned in the second paragraph hereof, less their surrender value, exempt and free from the said claim of the plaintiff in his declaration set forth; it being admitted that said proceeds con-

stitute the only assets in the possession of the defendant as executrix of the will of said Benajah D. Andrews, deceased.

8. On April 28, 1910, at the first meeting of the creditors of said bankrupt, duly called by said Referee, H. F. Stockwell, Esq., one of the attorneys for the plaintiff mentioned in said letter of attorney, appeared for several creditors of the bankrupt, among them
4 being the plaintiff, and at said meeting examined two witnesses. No nomination or voting for Trustee took place; H. F. Stockwell, Esq., first suggested to the attorneys present the name of Harvey K. Partridge for Trustee and then the attorneys present, including the said attorney for plaintiff, suggested to the Referee the name of Harvey K. Partridge, and no other suggestion or recommendation being made, the Referee ap-ointed Harvey K. Partridge Trustee, and fixed his bond at $5,000. The Referee also appointed appraisers of the bankrupt's property; they duly made and filed their appraisement, showing the assets of the bankrupt to be appraised by them at figures amounting to $1,016.00. The claims against the bankrupt duly proven and allowed at the first meeting of the creditors amounted to $55,823.92. The examination and creditors' meeting was continued to May 5, 1910. Additional claims against said bankrupt's estate, duly proved and allowed therein before June 6, 1911, amounted to $33,266.94.

9. On May 3, 1910, the Trustee's bond was approved, and John D. McMullin and Bleakly & Stockwell were appointed counsel for the Trustee.

10. On May 5, 1910, at the continuance of the creditors' meeting, said H. F. Stockwell, Esq., appeared for the Trustee, and, according to the record, also for creditors, and examined two witnesses and offered some papers in evidence.

11. No application for a discharge in bankruptcy was made in said bankruptcy proceedings by the said Benajah D. Andrews, bankrupt, or by the defendant as executrix of his estate, or by any person in behalf of said bankrupt or his estate; and no discharge in bankruptcy was granted in said bankruptcy proceedings.

12. There were outstanding at the time of the bankrupt's death the following policies of insurance upon his life:
5 13. A policy issued by the Reserve Loan Life Insurance Company of Indianapolis, for $5,000.00, payable to the estate of Benajah D. Andrews. On this policy there was an unpaid premium of $290.00, reducing the proceeds of this policy to $4,710.00. This sum, less the surrender value of said policy, and less the expense of litigation, is now held by the defendant as executrix of Benajah D. Andrews, in consequence of the decision of the case of Andrews vs. Partridge, hereinafter mentioned. The surrender value of this policy, being $100.00, was paid to the Trustee in bankruptcy.

14. A policy issued by the New England Mutual Life Insurance Company for $10,000.00, payable to the executors, administrators or assigns of Benajah D. Andrews. This policy, at the time of Andrews' death, was held by the Moorestown National Bank as assignee, to secure the payment of a loan made to the bankrupt. The proceeds of this policy, less the amount of said loan and less the surrender

value of the policy, were paid to the defendant as executrix of Benajah D. Andrews, in accordance with said decision of the Supreme Court of the United States in Andrews vs. Partridge, and were received, and, less the expenses of litigation, are now held by her as said executrix. The surrender value of this policy, being $14.93, was paid to the Trustee in bankruptcy.

15. A policy issued by the Philadelphia Mutual Life Insurance Company for $10,000.00, payable to Hannah L. Andrews, wife of Benajah D. Andrews, with the right reserved to Andrews to change the beneficiary. Hannah L. Andrews, as the beneficiary named in said policy, has collected thereon the sum of $9,249.63, and now holds the same claiming it to be her own and claiming also in consequence of the judgment of the United States Circuit Court of Appeals mentioned in paragraph 21 hereof.

6 16. Ten policies for $1,000.00 each, issued by the Fidelity Mutual Life Insurance Company of Philadelphia, payable to Hannah L. Andrews, wife of Benajah D. Andrews, with the right reserved to Andrews to change the beneficiary. Hannah L. Andrews, as the beneficiary named in said policies, has collected thereon the sum of $6,375.00, and now holds the same claiming it to be her own, and claiming also in consequence of the judgment of the United States Circuit Court of Appeals mentioned in paragraph 21 hereof.

17. In order to collect the money believed by the Trustee to be due the estate in bankruptcy on these policies, and to protect and secure other assets of the estate, said Trustee, by Bleakly & Stockwell, his attorneys, on June 28, 1910, filed with said Referee a petition asking for leave to bring certain suits, among them being a suit against said Reserve Loan Life Insurance Company on said policy; a suit against the New England Mutual Life Insurance Company on said policy; a suit against the Philadelphia Mutual Life Insurance Company on said policy, and suits against the Fidelity Mutual Life Insurance Company on said policies.

18. The Referee gave notice to creditors, including plaintiff, of a meeting of creditors to be held on July 31, 1910, for the purpose of passing on said petition.

19. On July 31, 1910, at the creditors' meeting so called as aforesaid, the attorneys for the Trustee, or one of them, advocated the granting of said petition to bring said suits, and there being no objection, an order was made by the Referee, authorizing and directing the Trustee to bring such suits.

20. Of the suits so authorized, the first was commenced by the Trustee filing, on November 19, 1910, in the United States District Court for the district of New Jersey, a petition against Han-

7 nah L. Andrews, executrix, the defendant in the present suit, praying that the proceeds of said policy in the Reserve Loan Life Insurance Company and the said policy in the said New England Mutual Life Insurance Company be decreed to be a part of the bankrupt estate, free from the claim of the defendant. The proceeds of said policies, in the amounts above mentioned, were, under a stipulation of the attorneys for the Trustee and the executrix, paid by said companies to and held by the Trustee in a special account to be

checked out by the Trustee only upon the counter-signature of the Referee in Bankruptcy and of the attorneys for the executrix after the adjudication of the claims of the Trustee and the executrix. The United States District Court, after oral and written argument by said counsel for the Trustee and by counsel for the respondent, held that the proceeds of these policies, less the surrender value thereof, which was $114.93, were the property of the executrix and should be paid to her. On an appeal from this order taken to the United States Circuit Court of Appeals for the Third Circuit, it was held, after oral and printed argument by John D. McMullin and H. F. Stockwell, of counsel with the Trustee, and by counsel for the respondent, that the entire proceeds of these policies were the property of the estate in bankruptcy, and the order made by the District Court was reversed. The Supreme Court of the United States allowed a writ of certiorari to review the judgment of the said Circuit Court of Appeals and also at the same time a similar writ to review a contrary judgment on a similar state of facts which had been given by the United States Circuit Court of Appeals for the Second Circuit, the case being that of —. The Supreme Court of the United States finally decided on April 28, 1913, in favor of the executrix and against the claim of the Trustee, the opinion being reported as Andrews vs. Partridge, in

228 U. S., 479, and the said surrender value was retained by

8 the Trustee and the balance of the proceeds paid to the executrix, the defendant in this suit, who received and now holds the same, less the expenses of litigation, as said executrix.

21. In the meantime, and before the said decision of Andrews vs. Partridge, and in accordance with said order made by the Referee, a suit was instituted by the Trustee against Hannah L. Andrews to recover the proceeds of the said policies in the Philadelphia Mutual Life Insurance Company and the Fidelity Mutual Life Insurance Company, the said proceeds of which had been paid to Hannah L. Andrews, as the beneficiary named in said policies. This case was argued by John D. McMullin, of counsel with the Trustee, and by counsel for the respondent, in the United States District Court for the District of New Jersey, where an order in favor of the respondent and dismissing the petition of the Trustee was made, from which order an appeal was taken to the United States Circuit Court of Appeals, which, after oral and written argument by the said John D. McMullin, as counsel for the Trustee, and by counsel for the said executrix, reserved decision until the Supreme Court of the United States should have disposed of the case of Andrews vs. Partridge above mentioned, and on July 25, 1913, affirmed the order appealed from. No proceeding to review said judgment has ever been taken.

22. On October 18, 1911, the said Trustee filed a petition showing expenses incurred by his counsel (some of which were in connection with the above mentioned suits authorized by said order of the Referee) amounting in all to $58.15, and praying that such expenses be allowed to his counsel.

23. And thereupon an order was made by the Referee, on October 20, 1911, allowing the said sum of $58.15 to the Trustee's counsel.

9 24. On October 29, 1912, the Trustee filed his report, showing the sale of property and the conduct of the above mentioned litigation and an account showing receipts of $2,905.87, and disbursements of $1,666.56, leaving a balance of cash on hand of $1,239.11. Among the disbursements was a payment of $1,056.46 to Ida W. Wheatman, said amount being funds which, after litigation with the Trustee in bankruptcy, were finally adjudged to her as her money erroneously included among the assets of the estate and ordered to be returned to her.

25. On May 26, 1913, the Trustee filed his petition, stating that the litigation carried to the Supreme Court of the United States had been decided adversely to the Trustee, and stating the condition of other litigation, and the fact that his counsel had, in such litigation, incurred expenses amounting to $139.75, in addition to those already allowed as above mentioned, and praying that the Trustee be instructed to pay the same at once.

26. On January 10, 1914, the Trustee filed his second report and account, showing that all property belonging to the estate had been reduced to cash, and the administration thereof practically completed, showing the disbursements since the last report, a part of which was in connection with said litigation, and showing a balance of cash on hand of $921.73, and praying for the declaration of a dividend.

27. On January 27, 1914, John D. McMullin and Bleakly & Stockwell, counsel for the Trustee, filed their petition, asking for an allowance of $600.00.

28. On January 27, 1914, Bleakly & Stockwell, as attorneys for the petitioning creditors (of whom the plaintiff was not one), filed their petition for an allowance of $50.00 for preparing and filing the petition in bankruptcy and the list of creditors.

10 29. The Referee gave notice to creditors, including plaintiff, of a meeting to be held on February 13, 1914, to pass upon and approve the report and account of the Trustee, to pass upon the petition of attorneys for petitioning creditors for compensation, to pass upon petition of attorneys for the Trustee for compensation, to declare a dividend to all creditors whose claims had been filed and allowed, and to transact such other business as might properly come before the meeting, and in said notice stated the balance in the hands of the Trustee and the amounts prayed for by the attorneys for the petitioning creditors and the attorneys for the trustee.

30. The plaintiff having been advised by his attorneys shortly after the first meeting of creditors above mentioned that unless the proceeds of the bankrupt's policies of life insurance made payable to his estate or to his executors, administrators or assigns were legally a part of the assets of the estate in bankruptcy, there could be only a very small dividend for creditors of the bankrupt estate; and that if in the event of litigation, it should be decided that said proceeds of said policies were not assets of the estate in bankruptcy, but should be turned over to the executrix of Andrews' estate, that it would be necessary for plaintiff to present its claim to said executrix in the Orphans' Court of Burlington county, and to pursue such remedy as might be

had from the decedent's personal representative in the Courts of New Jersey, application was, therefore, on February 13, 1914, made to the United States District Court for an order, of which the following is a copy:

United States District Court, District of New Jersey.

In the Matter of BENAJAH D. ANDREWS, Bankrupt.

Order Expunging Claim.

11 31. Application for this purpose having been made by Bleakly & Stockwell, attorneys for Joseph D. Hendrickson, who, it appears, has made proof of claim in this matter against said bankrupt estate for $10,000.00, being the amount due from the bankrupt for cash advanced and lent:

It is, therefore, ordered, on this thirteenth day of February, nineteen hundred and fourteen, that said claim and each and every other claim, if any, of the said Joseph D. Hendrickson, by or for him proven in this matter and against said estate, be, and the same hereby is wholly withdrawn from said bankruptcy proceedings and expunged from the list of claims upon the record in this case, and excluded from participating in the distribution of the estate of the said Benajah D. Andrews, bankrupt, under said bankruptcy proceedings.

Let this order be entered.

S. CONRAD OTT,
Referee in Bankruptcy.

On motion of

BLEAKLY & STOCKWELL,
Attorneys for Joseph D. Hendrickson.

We consent to the entering of this order.

BLEAKLY & STOCKWELL,
Attorneys for Joseph D. Hendrickson.

32. The creditors' meeting called for February 13, 1914, was, by order duly made and entered on said day, adjourned to March 18, 1914.

33. On May 11, 1914, the Referee made an order allowing to Bleakly & Stockwell, as counsel for the petitioning creditors, the sum of $50, and to Bleakly & Stockwell, as counsel for the Trustee,
12 the sum of $350, allowing to the Trustee his commissions and declaring and ordering a final dividend of .0136 per cent., all of which amounts and allowances were afterwards paid by the Trustee in accordance with said order; but no dividend in said bankruptcy proceedings was paid to plaintiff on his said claim, neither was any other payment thereon or any entire or partial satisfaction thereof made out of said estate in bankruptcy or otherwise, except to the extent, if any, that the facts above agreed to amount to a dividend, payment or satisfaction.

34. The order made by the Referee, as stated in the preceding

paragraph, allowing the sum of $350.00 to Bleakly & Stockwell, as counsel for the Trustee, was erroneous in failing to state that said allowance was also for John D. McMullin, as counsel for the Trustee, as well as for Bleakly & Stockwell, as such counsel; which error was rendered harmless by the payment of half of said allowance by Bleakly & Stockwell to the said John D. McMullin, for his services as counsel for the Trustee.

35. It is further agreed that either plaintiff or defendant shall be at liberty to print as a part of the state of the case or of his brief, a full and correct copy of any record, document or paper writing hereinbefore referred to, or a full and correct copy of any document or paper in the files of the United States District Court in said bankruptcy proceedings, said copies of said records, documents, or papers, if full and correct, being agreed upon by the parties hereto as a part of this stipulation.

BLEAKLY & STOCKWELL,
Attorneys for Plaintiff.
FRENCH & RICHARDS,
Attorneys for Defendant.

13 *Will of Benajah D. Andrews.*

I, Benajah D. Andrews, of the city and county of Camden and State of New Jersey, being of sound and disposing mind, memory and understanding, do make and publish this, my last will and testament.

First: I order and direct that all my just debts and funeral expenses shall be paid and satisfied by my executrix hereinafter named as soon as conveniently may be after my decease.

Second: I give and devise unto my son, Albert T. Andrews, his heirs and assigns forever, my undivided one-half interest in the farm situated on the Church road, near Colestown, in Delaware township, Camden county, New Jersey, which is owned by my brother Clayton L. Andrews and myself, as tenants in common, and also all my undivided one-half interest in all the wood lands devised by the will of my grandfather, Clayton Lippincott, to my brother Clayton L. Andrews and myself.

I also give and devise unto my son, Albert T. Andrews, his heirs and assigns, all my undivided interest in any lands which I may hold in common with my brother, Clayton L. Andrews, at the time of my decease.

Third: All the rest, residue and remainder of my estate, real, personal or mixed, whatsoever and wheresoever situate, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, I give, devise and bequeath unto my wife, Hannah L. Andrews, her heirs and assigns forever.

Fourth: I hereby authorize and empower my executrix, hereinafter named to sell any or all of my real estate, either at pub-
14 lic or private sale, at such times and for such prices as to her shall be satisfactory, and to execute, acknowledge and delive good and sufficient deeds of conveyance therefor, in fee simple, with-

out any liability on the part of the purchaser or purchasers thereof, as to the application, misapplication or non-application of the purchase money.

Lastly: I do hereby make, ordain, nominate, constitute and appoint my wife Hannah L. Andrews, sole executrix of this my last will and testament.

In witness whereof, I, the said Benajah D. Andrews, have to this my last will and testament, set my hand and seal on this twenty-first day of February, in the year of our Lord, one thousand nine hundred and three.

BENAJAH D. ANDREWS. [SEAL.]

Signed, sealed, published and declared by the above-named Benajah D. Andrews as and for his last will and testament in the presence of us, who were present at the same time, and who at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto.

ALBERT D. AMBRUSTER,
WM. D. LIPPINCOTT.

15 New Jersey Supreme Court, February Term, 1915.

JOSEPH D. HENDRICKSON
vs.
HANNAH L. ANDREWS, Executrix.

Submitted February 28, 1915. Decided June 17, 1915.

Upon an Agreed Case.

Before Gummere, C. J., and Justices Garrison and Minturn.

For the plaintiff, Bleakly & Stockwell.
For the defendant, French & Richards.

Per CURIAM:

This case is controlled by the decision in Nix vs. the same defendant.

Judgment is ordered for the plaintiff for $10,000 with interest and costs.

Judgment entered for plaintiff against defendant on June 26, 1915, for $14,090.00 damages and $29.00 costs.

16 New Jersey Supreme Court.

On Contract.

JOSEPH D. HENDRICKSON, Plaintiff,

vs.

HANNAH L. ANDREWS, Executrix, &c., of Benajah D. Andrews, Deceased, Defendant.

Notice of Appeal.

To Messrs. Bleakly & Stockwell, Attorneys of Plaintiff:

Take notice, that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

FRENCH & RICHARDS,
Attorneys of Appellant.

Service duly acknowledged July 6, 1915.

17 New Jersey Supreme Court.

On Contract.

JOSEPH D. HENDERSON, Plaintiff and Respondent,

vs.

HANNAH L. ANDREWS, Executrix, &c., of Benajah D. Andrews, Deceased, Defendant and Appellant.

Grounds of Appeal.

The appellant states the following grounds of appeal:

1. The interpretation placed by the Court upon the Bankruptcy Act of the United States is erroneous.

2. The judgment appealed from is in a suit wherein was drawn in question the construction of a statute of the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such statute.

3. The Court erred in its finding or judgment that the institution of bankruptcy proceedings is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

4. The Court erred in its finding or judgment that the allowance of counsel fees for litigation under leave of the Bankruptcy Court is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

18 5. The Court erred in its finding or judgment that the institution of bankruptcy proceedings and the allowance of

counsel fees for litigation under leave of the Bankruptcy Court is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

6. The Court erred in its finding or judgment that the payment of a portion of the funds of the bankrupt estate to counsel for the plaintiff was not a participation by plaintiff in the distribution of the bankrupt's estate.

7. The Court should have found that by the stipulated facts plaintiff presented his claim to the Referee in Bankruptcy for the same cause of action, which claim was duly allowed, filed with the Referee, a letter of attorney in the official form addressed to Messrs. Bleakly & Stockwell, the same attorneys who represented him in filing the petition in bankruptcy and the attorneys appearing for him in the instant suit, through his said attorneys selected the trustee who thereupon selected these same attorneys as his counsel, received notice of and made no objection to the petition of the trustee to bring suit for the assets in question, and that also before the order of February 13, 1914, was made it appeared by reports on file that the action taken and authorized by the plaintiff had used up substantially all the bankrupt estate, and that this in law was a participation by the plaintiff in the distribution of the estate under the bankruptcy proceedings.

8. The Court should have found that the participation by counsel for plaintiff in the distribution of the estate pays and discharges an indebtedness of plaintiff to his counsel and is in legal effect a participation by the plaintiff himself.

9. The Court upon the undisputed facts should have found that prior to the order of February 13, 1914, the plaintiff had participated.

19 10. The Court upon the undisputed facts should have found that after the order and notwithstanding the order plaintiff participated.

11. The Court erred in its finding or judgment that the question whether or not the plaintiff is in a legal sense a participant in the distribution of the estate of the bankrupt is foreclosed by the order of the Bankruptcy Court made on February 13, 1914.

12. The Court erred in its finding or judgment that by the order of the Bankruptcy Court made on February 13, 1914, the claim of the plaintiff is expunged from the list of claims and excluded from participating in the distribution of the estate of the bankrupt under such bankruptcy proceedings.

13. The Court erred in its finding or judgment that the order last above mentioned covers the matter in controversy.

14. The Court erred in its finding or judgment that the order last above mentioned is conclusive of the matter in controversy.

15. The Court should have found that the procedure of the Bankruptcy Court afforded no opportunity to litigate the order in question.

16. The Court should have found that plaintiff had already participated in the distribution of the estate and no order that plaintiff

might put upon the record without notice and without a hearing could change that fact.

17. The Court should have found that the order does not pretend to deny or change the fact that plaintiff has already participated.

18. The Court should have found that the effect of the ex parte order so voluntarily entered is that plaintiff holds on to what he has already received or used up and assigns to the other claimants his share of whatever may remain.

19. The Court should have found that there is no attempt to collaterally attack the order whereby plaintiff voluntarily orders himself excluded from further participation, the point being that he had already participated and notwithstanding the order afterwards again participated.

20. The Court should have found that the order at most is a restraining order directing the plaintiff not to participate, that the order is not collaterally attacked when it is shown that the plaintiff had already participated and that a contempt may be shown but there is no collateral attack in showing that afterwards and in spite of the order there was a participation.

21. The Court erred in ordering judgment for the plaintiff.

22. The Court should have rendered judgment for the defendant.

FRENCH & RICHARDS,
Attorneys for Defendant.

21 Form C248.

Doc. No. —.

STATE OF NEW JERSEY:

Court of Errors and Appeals, November Term, 1915.

Appeal from Supreme Court.

Error to — Court.

Joseph D. Hendrickson
and
Hannah L. Andrews, Ex'r'x.

No. 84, of Nov. Term, 1915.

Date, March, 1916.

Chancellor, Presiding.

Opinion by the Court Below.

Check list.	Affirm.	Reverse.	Modify.
The Chancellor	1		
" [Chief Justice]*			
Mr. Justice [Garrison]*			
" " Swayze	1		
" " Trenchard	1		
" " Parker	1		
" " Bergen	1		
" " [Minturn]*			
" " Kalisch	1		
" " Black	1		
Judge [White]*			
" Terhune	1		
" Heppenheimer	1		
" Williams	1		
" Taylor	1		
" [Gardner]*			
Totals	11		

Filed Mar. 6, 1916. Thomas F. Marin, Clerk.

[* Words in brackets erased in copy.]

22 New Jersey Court of Errors and Appeals, November Term, 1915.

Between

HANNAH L. ANDREWS, Executrix of the Will of Benajah D. Andrews, Deceased, Appellant,

vs.

JOSEPH D. HENDRICKSON, Respondent.

On Appeal from Supreme Court.

Order on Affirmance of Judgment.

This cause having been duly argued at the November Term, 1915, of this court by French and Richards, of counsel for the appellant, and Bleakly and Stockwell, of counsel for the respondent, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court—

It is thereupon, on this Sixth day of March in the year of our Lord one thousand nine hundred sixteen ordered and adjudged that the judgment of the Supreme Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

BLEAKLY & STOCKWELL,
Attorney- for Respondent.

[Endorsed] New Jersey Court of Errors and Appeals, November Term, 1915. Hannah L. Andrews, executrix of the will of Benajah D. Andrews, deceased, Appellant, vs. Joseph D. Hendrickson, Respondent. On Appeal from Supreme Court. Order Affirming Judgment. Bleakly & Stockwell, Att'ys. Filed Mar. 8, 1916. Thomas F. Martin, Clerk.

23 & 24 New Jersey Court of Errors and Appeals, November Term, 1915.

No. 84.

JOSEPH D. HENDRICKSON, Respondent,

v.

HANNAH L. ANDREWS, Executrix of the Will of Benejah D. Andrews, Deceased, Appellant.

Per Curiam.

On Appeal from the Supreme Court.

For the appellant, French & Richards.
For the respondent, Bleakly & Stockwell.

PER CURIAM:

The judgment under review will be affirmed, for the reasons expressed in the per curiam opinion of this court in John Nix & Company v. Hannah L. Andrews, &c., No. 86 of the November Term 1915.

Endorsed: "Filed Mar. 6, 1916. Thomas F. Martin, Clerk."

25 To the Honorable Edwin Robert Walter, Chancellor of the State of New Jersey and Chief Judge of the New Jersey Court of Errors and Appeals:

The petition of Hannah L. Andrews executrix of the will of Benajah D. Andrews, deceased, respectfully shows that the Court of Errors and Appeals of the State of New Jersey rendered a final judgment against your petitioner in a certain cause therein wherein Joseph D. Hendrickson was respondent and plaintiff below and your petitioner was appellant and defendant below affirming a judgment of the New Jersey Supreme Court against your petitioner and in favor of the said Joseph D. Hendrickson for $14,090.00 damages and $29.00 costs as will appear by reference to the record and proceedings in said cause; and that said Court of Errors and Appeals is the highest court of said state in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error because the suit in the state court drew in question the construction of the Bankruptcy Act of the United States and the decision was against the title right privilege or exemption specially set up and claimed by your petitioner under said statute as appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ
26 of error returnable into the Supreme Court of the United States, and for citation; and your petitioner will ever pray &c.

HANNA L. ANDREWS,
Executrix of, &c., of Benajah D. Andrews, Deceased, Petitioner.
THOMAS E. FRENCH,
SAMUEL H. RICHARDS,
Attorneys for Petitioner.

Let the writ of error issue as prayed.

E. R. WALKER,
Chancellor of New Jersey and President Judge of the Court of Errors and Appeals in the Last Resort in All Causes in said State.

27 [Endorsed:] New Jersey Court of Errors and Appeals. 3479. Joseph D. Hendrickson, Plaintiff and Respondent, vs. Hannah L. Andrews, executrix of the will of Benajah D. Andrews, deceased, Defendant and Appellant. Appeal from Supreme Court. Petition. French & Richards, Att'ys, 106 Market Street, Camden, N. J. Filed Mar. 29, 1916. Thomas F. Martin, Clerk.

28 New Jersey Court of Errors and Appeals.

JOSEPH D. HENDRICKSON, Plaintiff and Respondent,

vs.

HANNAH L. ANDREWS, Executrix of the Will of Benajah D. Andrews, Deceased, Defendant and Appellant.

Assignment of Errors.

Now comes Hannah L. Andrews, executrix of the will of Benajah D. Andrews, deceased, and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Errors and Appeals of the State of New Jersey in the above-entitled matter, there is manifest error in this, to wit:

1. The interpretation placed by the said Court upon the Bankruptcy Act of the United States is erroneous.

2. The judgment sought to be reversed is in a suit wherein was drawn in question the construction of a statute of the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such statute.

3. The Court erred in its finding or judgment that the institution of bankruptcy proceedings is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

29 4. The Court erred in its finding or judgment that the allowance of counsel fee for litigation under leave of the

Bankruptcy Court is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

5. The Court erred in its finding or judgment that the institution of bankruptcy proceedings and the allowance of counsel fees for litigation under leave of the Bankruptcy Court is not a participation in the distribution of the bankrupt's estate within the legal meaning of that term.

6. The Court erred in its finding or judgment that the payment of a portion of the funds of the bankrupt estate to counsel for the plaintiff was not a participation by plaintiff in the distribution of the bankrupt's estate.

7. The Court should have found that by the stipulated facts plaintiff presented his claim to the Referee in Bankruptcy for the same cause of action, which claim was duly allowed, filed with the referee, a letter of attorney in the official form addressed to Messrs. Bleakly & Stockwell, the same attorneys who represented him in filing the petition in bankruptcy and the attorneys appearing for him in the instant suit, through his said attorneys selected the trustee who thereupon selected these same attorneys as his counsel, received notice of and made no objection to the petition of the trustee to bring suit for the assets in question, and that also before the order of February 13, 1914, was made it appeared by reports on file that the action taken and authorized by the plaintiff had used up substantially all the bankrupt estate, and that this in law was a participation by the plaintiff in the distribution of the estate under the bankruptcy proceedings.

8. The Court should have found that the participation by counsel for plaintiff in the distribution of the estate pays and discharges an indebtedness of plaintiff to his counsel and is in legal effect a participation by the plaintiff himself.

9. The Court upon the undisputed facts should have found that prior to the order of February 13, 1914, the plaintiff had participated.

10. The Court upon the undisputed facts should have found that after the order and notwithstanding the order plaintiff participated.

11. The Court erred in its finding or judgment that the question whether or not the plaintiff is in a legal sense a participant in the distribution of the estate of the bankrupt is foreclosed by the order of the Bankruptcy Court made on February 13, 1914.

12. The Court erred in its finding or judgment that by the order of the Bankruptcy Court made on February 13, 1914, the claim of the plaintiff is expunged from the list of claims and excluded from participating in the distribution of the estate of the bankrupt under such bankruptcy proceedings.

13. The Court erred in its finding or judgment that the order last above mentioned covers the matter in controversy.

14. The Court erred in its finding or judgment that the order last above mentioned is conclusive of the matter in controversy.

15. The Court should have found that the procedure of the Bankruptcy Court afforded no opportunity to litigate the order in question.

31 16. The Court should have found that the plaintiff had already participated in the distribution of the estate and no order that plaintiff might put upon the record without notice and without a hearing could change that fact.

17. The Court should have found that the order does not pretend to deny or change the fact that plaintiff has already participated.

18. The Court should have found that the effect of the ex parte order so voluntarily entered is that plaintiff holds on to what he has already received or used up and assigns to the other claimants his share of whatever may remain.

19. The Court should have found that there is no attempt to collaterally attack the order whereby plaintiff voluntarily orders himself excluded from further participation, the point being that he had already participated and notwithstanding the order afterwards again participated.

20. The Court should have found that the order at most is a restraining order directing the plaintiff not to participate, that the order is not collaterally attacked when it is shown that the plaintiff had already participated and that a contempt may be shown but there is no collateral attack in showing that afterwards and in spite of the order there was a participation.

21. The Court erred in affirming judgment for the plaintiff.

22. The Court should have reversed the judgment.

THOMAS E. FRENCH,
SAMUEL H. RICHARDS,
Attorneys for Plaintiff in Error.

32 [Endorsed:] New Jersey Court of Errors and Appeals. 3479. Joseph D. Hendrickson, Plaintiff and Respondent, vs. Hannah L. Andrews, executrix of the Will of Benajah D. Andrews, deceased, Defendant and Appellant. Assignment of Errors. French & Richards, Att'ys, 106 Market Street, Camden, N. J. Filed Mar. 29, 1916. Thomas F. Martin, Clerk.

33 UNITED STATES OF AMERICA, *ss:*

[Seal District Court of the United States, District of New Jersey.]

The President of the United States to the Honorable Judges of the Court of Errors and Appeals of the State of New Jersey, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Court of Errors and Appeals of the State of New Jersey before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Joseph D. Hendrickson, plaintiff-respondent, and Hannah L. Andrews, executrix of the will of Benajah D. Andrews deceased, defendant-appellant, wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege or

exemption specially set up or claimed under such clause of said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said Hannah L. Andrews executrix of the will of Benajah D. Andrews deceased as by her complaint appears We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein
34 given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States together with this writ, so that you have the same at Washington, on the eleventh day of April next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct the same what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court the Fifth day of April in the year of our Lord one thousand nine hundred and sixteen.

GEORGE T. CRANMER, *Clerk*.
By CHARLES S. CHEVRIER,
Deputy Clerk.

Allowed by—

E. R. WALKER,
Chancellor of New Jersey and President Judge of the Court of Errors and Appeals in the Last Resort in All Causes in said State.

35 [Endorsed:] 3479. United States Supreme Court. Hannah L. Andrews, executrix, &c., Plaintiff in Error, v. Joseph D. Hendrickson, Defendant in Error. Writ of Error to New Jersey Court of Errors and Appeals. Returnable April 11, 1916 Thomas E. French, Samuel H. Richards, Attorneys. Filed Mar. 29, 1916. Thomas F. Martin, Clerk.

36 Know all men by these presents, that we, Hannah L. Andrews and Joseph Kaighn and Amos E. Kaighn, all of the township of Chester in the County of Burlington and State of New Jersey, are held and firmly bound unto Joseph D. Hendrickson in the sum of two hundred and fifty dollars, to be paid to the said Joseph D. Hendrickson, his executors, administrators and assigns; to which payment well and truly to be made we bind ourselves and our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this fourteenth day of March, A. D. 1916.

Whereas, lately at a term of the Court of Errors and Appeals of the State of New Jersey in a suit depending in said court between Joseph D. Hendrickson plaintiff and respondent and Hannah L. Andrews executrix of the will of Benajah D. Andrews, deceased

defendant and appellant, the court affirmed a judgment of New Jersey Supreme Court of $14,090.00 damages and $29.00 costs which in said Supreme Court was rendered against the said defendant and the said defendant having obtained a writ of error to remove the judgment in the aforesaid suit,

Now, therefore, the condition of this obligation is such that if the said Hannah L. Andrews executrix of the will of Benajah D. Andrews deceased shall prosecute said writ of error to effect and answer all costs if she fails to make her plea good then this obligation shall be void; otherwise to remain in full force and virtue.

HANNA L. ANDREWS. [SEAL.]
JOSEPH KAIGHN. [SEAL.]
AMOS E. KAIGHN. [SEAL.]

Signed, sealed and delivered in the presence of—
WM. A. FORMAN, JR.

37 STATE OF NEW JERSEY,
County of Burlington, ss:

Joseph Kaighn and Amos E. Kaighn, sureties named in the foregoing bond, each alleging himself to be conscientiously scrupulous against taking an oath, and each being duly affirmed on his solemn affirmation, affirms and says that he is a resident and freeholder in the County of Burlington and State of New Jersey, and is worth the sum of five hundred dollars over and above all his debts and liabilities exclusive of property exempt from execution.

JOSEPH KAIGHN.
AMOS E. KAIGHN.

Affirmed and subscribed to this fourteenth day of March, A. D. 1916, before me a notary public in and for the County of Burlington, State of New Jersey.

CLEMENT R. LIPPINCOTT, [SEAL.]
Notary Public for N. J.

Com. expires 3/15/1918.

I hereby approve the foregoing bond and sureties.

E. R. WALKER,
Chancellor and President Judge of the New Jersey Court of Errors and Appeals in the Last Resort in All Causes in said State.

[Endorsed:] New Jersey Court of Errors and Appeals. Joseph D. Hendrickson, Plaintiff and Respondent, vs. Hannah L. Andrews, executrix of the will of Benajah D. Andrews, deceased, Defendant and Appellant. Appeal from Supreme Court. Bond. Approved inside. E. R. W., C. & P. J. Filed Mar. 29, 1916, Thomas F. Martin, Clerk.

38 STATE OF NEW JERSEY:

[Vignette.]

Court of Errors and Appeals.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that there was lodged with me as such Clerk, on March 29th, 1916, in the case of Joseph D. Hendrickson, Plaintiff and Respondent, vs. Hannah L. Andrews, executrix of the will of Benajah D. Andrews, deceased, Defendant and Appellant:

1. The original Bond of which a copy is herein set forth.
2. Two copies of Writ of Error, as herein set forth—one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Thirtieth day of March, A. D. 1916.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

39 STATE OF NEW JERSEY:

[Vignette.]

Court of Errors and Appeals.

JOSEPH D. HENDRICKSON, Plaintiff and Respondent,

vs.

HANNAH L. ANDREWS, Executrix of the Will of Benajah D. Andrews, Deceased, Defendant and Appellant.

In obedience to the command of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Thirtieth day of March, A. D. 1916.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

40 UNITED STATES OF AMERICA, *ss:*

To Joseph D. Hendrickson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of Court of Errors and Appeals of the State of New Jersey, wherein Hannah L. Andrews executrix &c. of Benajah D. Andrews, deceased is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States this 28th day of March, in the year of our Lord one thousand nine hundred and sixteen.

Allowed by—

E. R. WALKER,
Chancellor and President Judge of the New Jersey Court of Errors and Appeals in the Last Resort in All Causes in said State.

Service of the above citation upon Joseph D. Hendrickson is acknowledged this twenty-eighth day of March, A. D. 1916.

BLEAKLY & STOCKWELL,
Attorneys for Joseph D. Hendrickson.

Endorsed on cover: File No. 25,223. New Jersey Court of Errors and Appeals. Term No. 437. Hannah L. Andrews, executrix of the will of Benajah D. Andrews, deceased, plaintiff in error, vs. Joseph D. Hendrickson. Filed April 7th, 1916. File No. 25,223.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 141.

HANNAH L. ANDREWS, EXECUTRIX OF THE WILL OF BENAJAH D. ANDREWS, DECEASED, PLAINTIFF IN ERROR,

vs.

JOSEPH D. HENDRICKSON, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This case in the courts below was heard and decided with the case of John Nix & Company, No. 140. The facts in the two cases are identical, except that Hendrickson was not one of the petitioning creditors in the bankruptcy proceeding. The judgments entered in the two cases, however, were for different amounts, that entered in favor of Hendrickson being for $14,090.00 damages and $29.00 costs.

Specification of Errors.

The errors specified in this case are the same as those specified in the Nix case, No. 140.

Brief of the Argument.

The brief of the argument and the argument in the Nix case, No. 140, apply equally to the instant case, except that here subdivision II has no application because Hendrickson was not one of the petitioning creditors.

In this case also the judgment should be reversed.

All of which is respectfully submitted.

THOMAS E. FRENCH,
SAMUEL H. RICHARDS,
Counsel for Plaintiff in Error.

Supreme Court of the United States

HANNAH L. ANDREWS, Executrix of Benajah D. Andrews, now deceased,
Plaintiff in Error,

vs.

JOSEPH D. HENDRICKSON,
Defendant in Error.

BRIEF FOR DEFENDANT.

STATEMENT OF THE CASE.

This case in the State Court was heard and decided with the case of John Nix & Company, No. 140, of the present term.

This case differs from that of John Nix & Company (No. 140) only in the following respects—

.....The State Court entered judgment in favor of Joseph D. Hendrickson in the sum of $14,090.00 damages, and $29.00 costs.

.....Joseph D. Hendrickson was not one of the Petitioning Creditors in the Bankruptcy proceedings against B. D. Andrews.

BRIEF OF ARGUMENT.

The brief of argument and the argument in the case of John Nix & Company (No. 140) apply with equal force to this case.

Inasmuch as Hendrickson was not one of the petitioning creditors in the Andrews' Bankruptcy proceedings, the argument of plaintiff in error, in Case 140, based on that point has no application here.

For the reasons stated in our brief in the Nix case, the judgment below should be affirmed.

E. G. C. BLEAKLY,

HENRY F. STOCKWELL,

Counsel for Defendant in Error.

ANDREWS, EXECUTRIX OF ANDREWS, *v.* JOHN NIX & COMPANY.

ANDREWS, EXECUTRIX OF ANDREWS, *v.* HENDRICKSON.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

Nos. 140, 141. Argued January 22, 1918.—Decided March 4, 1918.

Creditors who participated in the initiation of involuntary bankruptcy proceedings, in the election of a trustee and in a creditors' meeting resulting in expense to the estate, and who filed and secured allowance of their claims, but who received no payments and, before any dividend was declared, obtained an order that their claims be wholly withdrawn and expunged and excluded from participating in the distribution of the estate, *held* not to be "creditors participating in the distribution" of the estate "under the bankruptcy proceedings" within the meaning of § 70a, subdivision 5, of the Bankruptcy Act. 88 N. J. L. 721, 718, affirmed.

THE cases are stated in the opinion.

Mr. Samuel H. Richards, with whom *Mr. Thomas E. French* was on the briefs, for plaintiff in error.

Mr. Henry F. Stockwell, with whom *Mr. E. G. C. Bleakly* was on the briefs, for defendants in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

These two cases, presenting the same question for decision, were argued and will be decided together.

On February 3, 1910, the defendant in error, John Nix & Company, and two other creditors filed an involuntary petition in bankruptcy against Benajah D. Andrews. On the 15th day of the same month Andrews died and the plaintiff in error was duly appointed executrix of his will. On the 4th of the following April the estate of Andrews was adjudicated bankrupt by the District Court and on the 28th day of the same month a trustee was appointed. Each of the defendants in error promptly made proof of a claim against the bankrupt estate, and both claims were forthwith allowed.

On February 13, 1914, almost four years after these claims were allowed, on the application of Nix & Company and of Hendrickson, the District Court ordered that the claim of each of them "be wholly withdrawn from said bankruptcy proceeding and expunged from the list of claims upon the record in this case and excluded from participating in the distribution of the estate . . . of the bankrupt." After the entry of this order a dividend was declared and paid by the trustee in which Nix & Company and Hendrickson did not participate. No order for the discharge of the bankrupt estate was applied for or granted.

At the time of his death Andrews owned two policies of insurance upon his life, one payable to his estate and the other payable to his executors, administrators and assigns. The proceeds of these two policies, less loans secured by them and less their surrender value, which was paid to the trustee in bankruptcy, were paid to the

plaintiff in error as executrix and the money is held by her subject to the decision of this case.

The defendants in error instituted suits in the Supreme Court of the State of New Jersey to recover judgments on the same claims which had been allowed by the trustee but were subsequently withdrawn. The cases were submitted to the court upon a stipulation as to the essential facts substantially as we have stated them, and each recovered a judgment which was affirmed by the Court of Errors and Appeals of the State of New Jersey, which judgments are before us for review.

The case is in very narrow compass and calls upon us to consider the proviso of subdivision 5 of § 70a of the Bankruptcy Act of 1898 and to decide whether the defendants in error "participated in the distribution" of the bankrupt's estate under the bankruptcy proceedings, within the meaning of that proviso, which reads as follows:

"Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy *free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings*, otherwise the policy shall pass to the trustee as assets."

The argument of the plaintiff in error is that these defendants are brought within the purpose, if not within the express terms, of this statutory proviso and should not recover, for the reason that they participated in the election of the trustee in bankruptcy, proved their claims, and were represented in the meeting of creditors at which important action was taken involving expense to the bankrupt estate.

Unfortunately for the validity of this argument the provision of the statute is not that the proceeds of the insurance policies may be held "free from the claims" of creditors *who participated in the bankruptcy proceedings*, but only from the claims of creditors "*participating in the distribution of the estate in the bankruptcy proceedings.*"

Whether a line of discrimination between such two classes of creditors is wise or logical is not for us to decide. It is enough that it lies plainly obvious upon the face of the statute. No dividend was paid creditors until after the defendants in error by order of the court had been excluded from participation in the distribution of the estate, and it is stipulated in the agreed case that no payment was made to either of them. The meaning of the proviso is too plain for discussion or interpretation and that the defendants in error did not "participate in the distribution of the estate in the bankruptcy proceedings" is clear. The judgments of the Court of Errors and Appeals of the State of New Jersey must be

Affirmed.